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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ACTION FOR CHILDREN'S TELEVISION, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 16(a) of the Public Telecommunications Act of 1992, whether standing alone or as limited by the Court of Appeals, violates the First Amendment.

PARTIES TO THE PROCEEDINGS

The petitioners are Action For Children's Television; American Civil Liberties Union; Association of Independent Television Stations, Inc.; Capital Cities/ABC, Inc.; CBS Inc.; Fox Television Stations, Inc.; Infinity Broadcasting Corporation; Greater Media, Inc.; Motion Picture Association of America, Inc.; National Association of Broadcasters; National Public Radio; People For The American Way; Post-Newsweek Stations, Inc.; Public Broadcasting Service; Radio-Television News Directors Association; The Reporters Committee for Freedom of the Press; and Society of Professional Journalists.

Pursuant to this Court's Rule 29.1, following are the parent companies and subsidiaries (except wholly owned subsidiaries) of those petitioners that are corporations:

Petitioner Fox Television Stations, Inc., is a wholly owned subsidiary of News America Holdings, Inc., and The News Corporation, Ltd. Petitioner Post-Newsweek Stations, Inc., is a wholly owned subsidiary of The Washington Post Company. A minority of the stock of petitioner Capital Cities/ABC, Inc. is owned by Berkshire Hathaway, Inc. A minority of the stock of petitioner CBS Inc. is owned by Loew's Corporation. It has been announced that the Walt Disney Company intends to acquire Capital Cities/ABC, Inc. and that Westinghouse Electric Corporation intends to acquire CBS Inc.

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PETITION FOR A WRIT OF CERTIORARI

Action for Children's Television, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The en banc opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 58 F.3d 654. It is reprinted at pages 1a-74a of the appendix to this petition. The vacated panel opinion was reported at 11 F.3d 170 and is reprinted at pages 75a-110a of the appendix. The Federal Communications Commission's Report and Order was published at 8 F.C.C.R. 704 and is reprinted at pages 111a-138a of the appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

This is a First Amendment challenge to Section 16(a) of the Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, 954, and the regulation promulgated thereunder, 47 C.F.R. § 73.3999. The statute and regulation seek to enforce the broadcast indecency prohibition contained in 18 U.S.C. § 1464 (1988), *amended by* Pub. L. No. 103-322, 108 Stat. 2147. The relevant constitutional, statutory, and regulatory provisions are reproduced in the appendix at 139a-140a.

STATEMENT OF THE CASE

This case presents important questions concerning the government's authority to regulate "indecent" material in radio and television broadcasts. These questions have not been considered by the Court in the nearly two decades

since its sharply divided decision in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). Specifically, this case concerns the constitutionality of Section 16(a) of the Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, which imposed a 6 a.m.-to-midnight ban on broadcasts of material that the Federal Communications Commission ("FCC") deems "indecent," although not obscene.

The Court of Appeals for the District of Columbia Circuit, after invalidating Section 16(a) in its original panel decision, granted rehearing en banc and generally upheld the statute. The court found Section 16(a) unconstitutional only to the extent that it allowed certain public broadcasters to present "indecent" material beginning at 10 p.m., two hours earlier than all other broadcasters. The court thereupon rewrote the statute to impose a 6 a.m.-to-10 p.m. indecency ban on all broadcasters.

* * * *

Congress and the FCC have periodically sought, under 18 U.S.C. § 1464, to restrict the broadcast of so-called "indecent" material—that is, material that may be considered offensive or sexually suggestive, but that is not obscene, either because it does not appeal to the prurient interest, or because it has serious literary, artistic, political, or scientific merit, or both.

In the mid-1970s, the FCC began to focus its attention on the repeated use of what became known as the "seven dirty words." In *Pacifica*, 438 U.S. 726, this Court affirmed the FCC's ruling that the repeated use of those words in comedian George Carlin's "Filthy Words" monologue was indecent, and that a radio broadcast of the monologue at 2 p.m. on a weekday afternoon violated 18 U.S.C. § 1464. The Court "emphasize[d] the narrowness of [its] holding," making clear that "questions concerning possible action in other contexts were expressly reserved for the future." 438 U.S. at 734, 750. The Court specifically noted that the FCC had not foreclosed the broadcast of similar material during the evening hours. *Id.* at 750 n.28.

In the aftermath of *Pacifica*, the FCC limited its indecency regulation to "the repeated use, for shock value, of words similar or identical to those satirized in the Carlin 'Filthy Words' monologue." *In re Infinity Broadcasting Corp.*, 3 F.C.C.R. 930 (1987), *vacated in part sub nom. Action for Children's Television v. FCC* (*"ACT I"*), 852 F.2d 1332 (D.C. Cir. 1988). Broadcasters were permitted to "channel" material containing those words to a "safe harbor" period after 10 p.m. *Id.* In view of the FCC's very restrictive definition of what was "indecent," which had caused the FCC to reject every indecency complaint filed in the years immediately following *Pacifica*, broadcasters did not challenge the extent of the safe harbor.

In 1987, the FCC substantially expanded its regulation of broadcast indecency. *See* Public Notice, 2 F.C.C.R. 2726 (1987). The FCC announced that its indecency enforcement would no longer be limited to the particular words at issue in *Pacifica*. Instead, the FCC would deem "indecent" any "language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Id.* at 2726. The FCC indicated that enforcement under this new standard would encompass a wide range of material [1] —including news,[2] informational programs,[3] political ad-

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[1] The FCC did not in each of the following instances find the particular material to be indecent, but it did make clear that these types of programs are not exempt from its indecency regulation.

[2] *See, e.g., KSD-FM*, Notice of Apparent Liability, 6 F.C.C.R. 3689 (1990) ("while the newsworthy nature of broadcast material and its presentation in a serious, newsworthy manner would be relevant contextual considerations in an indecency determination, they are not, in themselves, dispositive factors"); *see also* Report and Order, *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 8 F.C.C.R. 704, 709 (1993) ("1993 Report and Order") (noting petitioners' "request to make news and public affairs programs entirely exempt from indecency enforcement" without granting request).

[3] *See, e.g., FCC Investigating; Group W Says Indecency Finding Against KYW-TV Philadelphia Would Be Censorship*, Communica-

vertising,[4] serious drama,[5] motion pictures,[6] musical recordings,[7] and satirical material on political and sociological themes.[8] Although noting that "consideration of context is critical in all indecency cases," the FCC refused to "single [serious merit] out for greater weight or attention" in determining whether material is indecent, or to exempt news and public affairs programs from the reach of the definition. *Infinity*, 3 F.C.C.R. at 932, 937 & n.28. The FCC also limited "indecent" broadcasts to times when there was no "reasonable risk" of children in the audience, a limitation that appeared to cover all hours of the day. 2 F.C.C.R. at 2726.

On reconsideration, the FCC agreed that a safe harbor for "indecent" programs was necessary, but narrowed it to the hours between midnight and 6 a.m. *Infinity*, 3 F.C.C.R. 930. The FCC made clear that its indecency

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tions Daily, Apr. 26, 1993, at 3 (report on FCC investigation of local television program dealing with Philadelphia adult establishment); Letter to Mr. and Mrs. Roland Orie from Chief, Mass Media Bureau (Apr. 7, 1988) (informational program on sex education for teenagers).

[4] *See, e.g.*, Letter to Hon. John E. Bourne, Jr., from Chief, Mass Media Bureau (Apr. 7, 1988) (political advertisement concerning the word "clocksucker" in reference to mayor's desire to purchase clock for City Hall).

[5] *See, e.g., Pacifica Foundation, Inc.*, 2 F.C.C.R. 2698 (play dealing with AIDS and homosexuality), *reconsideration and clarification granted in part, denied in part sub nom. Infinity Broadcasting Corp. of Pa.*, 3 F.C.C.R. 930 (1987), *vacated in part and remanded sub nom. ACT I*, 852 F.2d 1332; Letter to Thomas Byrne from Chief, Mass Media Bureau (Apr. 7, 1988) (radio presentation of *Ulysses* was not "indecent" because of its considerable duration).

[6] *See, e.g., Kansas City Television, Ltd.*, Order, FCC 88-274 (Aug. 5, 1988) (film *Private Lessons*), *vacated*, 4 F.C.C.R. 6706 (1989).

[7] *See, e.g., KLUC-FM*, Notice of Apparent Liability, 6 F.C.C.R. 3695 (1990) (recording of song "Erotic City" by Prince).

[8] *See, e.g., WLIZ*, Notice of Apparent Liability, 6 F.C.C.R. 3698 (1989) (song parodies satirizing male attitudes toward sexuality).

regulation was designed "to enable parents to decide effectively what material of this kind their children will see or hear." *Id.* at 931.

The Court of Appeals (then-Judge (now-Justice) Ginsburg and Judges Robinson and Sentelle) affirmed in part and reversed in part. *ACT I*, 852 F.2d 1332. Writing for the court, then-Judge Ginsburg recognized that "vagueness is inherent" in the FCC's indecency definition, but concluded that *Pacifica* foreclosed any finding that the definition was unconstitutionally vague. *Id.* at 1339, 1344. The court, however, "welcome[d] correction" of its reading of *Pacifica* from "Higher Authority." *Id.*

The court also held that the FCC's 6 a.m.-to-midnight prohibition on broadcast indecency was unconstitutionally broad. *Id.* at 1340-44. The FCC was obligated to implement a more "reasonable" safe harbor, said the court, in order to "allow scope for the first amendment-shielded freedom and choice of broadcasters and their audiences." *Id.* at 1343 n.18. The court reasoned that "the government's role is to facilitate parental supervision of children's listening," and "[t]hus, the FCC must endeavor to determine what channeling rule will most effectively promote parental—as distinguished from government—control." *Id.* at 1343-44. The court remanded the matter to the FCC to conduct a "full and fair" hearing on the appropriate dimensions of a safe harbor. *Id.* at 1340-44.[9]

Shortly thereafter, Congress directed the FCC to promulgate regulations enforcing a 24-hour-a-day ban on broadcast indecency. Pub. L. No. 100-459, § 608, 102 Stat. 2228. The FCC promptly commenced a new proceeding and implemented the ban. *Enforcement of Prohibitions Against Broadcast Obscenity and Indecency in 18 U.S.C. § 1464*, 4 F.C.C.R. 457 (1988). While the

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[9] The court directed the FCC to consider, among other things, whether station- or program-specific audience data could be used in order to better assess whether any "reasonable risk" exists that significant numbers of unsupervised children are in the audience. *See ACT I*, 852 F.2d at 1340-43.

challenge to this new indecency ban was awaiting judicial review, this Court decided *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989), which held that a ban on indecent dial-a-porn services violated the First Amendment. The Court of Appeals remanded the challenge to the broadcast indecency ban "in light of . . . *Sable*," again directing the FCC to "conduct a full and fair hearing" to justify its indecency regulation. *Action for Children's Television v. FCC*, No. 88-1916, Order (D.C. Cir. Sept.13, 1989).

In the remand proceeding, petitioners submitted evidence demonstrating that the indecency ban was not a narrowly tailored means of protecting unsupervised children, because most persons under age 18 are in the presence of parents or other adults during many hours of the day. *See* Comments of Action for Children's Television, *et al.*, MM Docket No. 89-494 at 32-33 & Appendix C (Feb. 20, 1990). For example, during the 8 p.m.-to-6 a.m. safe harbor period then being used by the FCC under a stay granted by the Court of Appeals, 98% of all young people are under adult supervision, at school or asleep.

The FCC issued a report in support of its prior conclusion that a complete ban on broadcast indecency was justified. *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 5 F.C.C.R. 5297 (1990). The FCC asserted that the government has an independent interest in shielding children from "indecent" broadcasts, even during hours when parents are available to supervise their children's viewing and listening. *Id.* at 5299. The FCC concluded that the ban was "narrowly tailored" because "significant numbers of children are in the audience at all times"—many of whom were not receiving "effective" or "meaningful" supervision, since their parents were not "co-viewing" or "co-listening" with them. *Id.* at 5302, 5305-06.

On review, the Court of Appeals (Chief Judge Mikva, then-Judge (now-Justice) Thomas, and Judge Edwards)

held that the 24-hour-a-day ban could not withstand First Amendment scrutiny, and that some portion of the day must be set aside as a safe harbor for "indecent" programs. *Action for Children's Television v. FCC* ("*ACT II*"), 932 F.2d 1504, 1509-10 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 913 (1992). The case was yet again remanded to the FCC for a " 'full and fair hearing.' " [10]

On June 2, 1992, during the Senate's consideration of the Public Telecommunications Act, Senator Byrd offered a floor amendment to require the FCC to enforce a 6 a.m.-to-midnight ban on "indecent programming." *See* 138 Cong. Rec. S7308 (daily ed. June 2, 1992). The amendment allowed public broadcasters who sign off the air by midnight to present such programs after 10 p.m. The amendment was adopted by the Senate, and subsequently by the House, without committee consideration or significant floor debate. *Id.* at S7423-24 (daily ed. June 3, 1992); *id.* at H7272 (daily ed. Aug. 4, 1992). When the Public Telecommunications Act was before the House, Representative Dingell, its floor manager, advised his colleagues that "the Byrd amendment is clearly unconstitutional," but nonetheless urged that the entire Act be approved. *Id.* at H7264. The amendment became Section 16(a) of the Act, which President Bush signed into law on August 26, 1992.

The FCC commenced a new rulemaking to implement the ban. In that proceeding, these petitioners pointed to ratings data demonstrating that the ban would deny adult viewers and listeners access to constitutionally protected material. They also directed the FCC's attention to the earlier evidence that virtually no unsupervised children or teenagers are in the broadcast audience during many hours of the day.

On January 22, 1993, the FCC adopted regulations to enforce Section 16(a). Report and Order, *In re Enforce-*

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[10] Again, the Court considered itself constrained by precedent from finding the FCC's definition of indecency to be unconstitutionally vague. 932 F.2d at 1508.

ment of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, 8 F.C.C.R. 704 (1993) ("1993 Report and Order") (App. 111a). In seeking to justify the 6 a.m.-to-midnight ban, the FCC asserted that its interest in regulating indecency was not "restricted to ensuring that parents have an opportunity to supervise their children's listening and viewing," but also encompassed an "independent interest in ensuring the well being of minors." App. 116a.[11] The FCC concluded that the new indecency ban was "narrowly tailored" to serve these interests, relying on the record assembled in the rulemaking on the earlier 24-hour-a-day ban. The FCC reiterated that "significant" numbers of persons under age 18 are in the broadcast audience at all hours. *Id.* at 114a-115a. The FCC then asserted that many such persons are not "effectively supervise[d]" in their exposure to television and radio, because many parents, even when at home, do not watch television or listen to the radio with their children. *Id.* at 133a.

On November 18, 1993, a panel of the Court of Appeals unanimously struck down Section 16(a)'s indecency ban as unconstitutional, explaining that it was not "tailored . . . narrowly" to avoid "unnecessary abridgement of First Amendment rights." *Action for Children's Television v. FCC*, 11 F.3d 170, 183 (D.C. Cir. 1993) (Chief Judge Mikva and Judges Edwards and Wald) (App. 102a). The full court vacated the panel opinion and granted en banc review.

On June 30, 1995, the en banc court issued its decision upholding Section 16(a) in principal part. *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (App. 1a). The court, speaking through Judge Buckley, accorded considerable deference to Congress's and the FCC's determinations as to the constitutionality of the new indecency ban, without requiring the

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[11] The FCC also claimed an interest in protecting "the right of all members of the public to be free of indecent material in the privacy of their homes." App. 118a (1993 Report and Order). The Court of Appeals did not rely on this interest.

government to make a factual showing that the indecency ban addresses an actual harm and is narrowly tailored. App. 16a-17a. The Court identified two "compelling" interests served by the indecency ban: first, "supporting parental supervision of children," and second, "shielding them from the influence of indecent broadcasts," which could lead upon "persistent exposure" to "the coarsening of impressionable minds." App. 16a-17a. The court then concluded that the indecency ban was "narrowly tailored" to serve those interests, because "large numbers of children view television or listen to the radio from the early morning until late in the evening." *Id.* at 21a. As for adults' interest in receiving material that might be deemed "indecent," the court noted that some adults remain in the television and radio audience late at night and, in any event, that "adults have alternative means of satisfying their interest in indecent material." *Id.* at 24a.

The court held that Section 16(a) was unconstitutional, however, to the extent that it established an earlier safe harbor for public broadcasters who sign off the air by midnight. App. 30a. The court explained that Congress and the Commission had offered no adequate justification for this differential treatment of certain public broadcasters. *Id.* The court did not strike down Section 16(a) based on this unconstitutionality, but instead effectively rewrote Section 16(a) to allow indecency regulation only between the hours of 6 a.m. and 10 p.m. *Id.* The court signaled to Congress, however, that the indecency safe harbor could begin as late as midnight, so long as it applied to all broadcasters.

Four members of the Court of Appeals dissented. Chief Judge Edwards emphasized that the government had "offer[ed] no evidence that indecent broadcasting harms children," and thus had not justified its "independent" interest in protecting children from such broadcasting. App. 38a (Edwards, J., dissenting). He also noted that the government had not given adequate consideration to less "speech-restrictive" alternatives. *Id.* at 38a, 61a.

Judge Wald, writing for herself and Judges Rogers and Tatel, emphasized that broadcasters and adult audiences need a "meaningful safe harbor," especially in view of the "quite substantial" "chill" caused by the FCC's indecency enforcement activities. App. 66a-67a (Wald, J., dissenting). As a result of the subjective and case-specific nature of the FCC's determinations of what is "indecent," she explained, "broadcasters have next-to-no guidance in making complex judgment calls." *Id.* at 67a. "And even a 'serious' presentation of newsworthy material," she noted, "is emphatically not shielded from liability." *Id.* at 68a.

The FCC's indecency enforcement activities—the ones found by Judge Wald to be so "chill[ing]"—have continued during the pendency of the *ACT* cases. Since 1987, the FCC has issued some 36 indecency forfeiture orders against broadcasters, all of them for material contained in radio programs. *See Action for Children's Television v. FCC* (*"ACT IV"*), 59 F.3d 1249, 1264 (D.C. Cir. 1995) (Tatel, J., dissenting) (also reported as *South Fork Broadcasting Co. v. FCC*). Because these "orders take from two to seven years to get to court, if they get there at all," broadcasters have yet to obtain judicial review of a single FCC determination that a broadcast was "indecent." *Id.* In the meantime, broadcasters who are the subjects of indecency forfeiture orders have faced escalating fines, public condemnation by FCC commissioners, and even the threatened loss of their licenses, all in an effort to pressure them to conform to the FCC's notions of "decency." *Id.*; *see id.* at 1252 (majority opinion) ("agree[ing] that the FCC's implementation of its enforcement scheme is potentially troubling in some respects").[12]

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the content-based suppression of indecent, but not obscene, speech—speech that Congress, the FCC, and apparently the majority of the Court of Appeals consider of little

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[12] A separate petition for certiorari will be filed in the *ACT IV* case.

value. Yet, this is speech that broadcasters have a First Amendment interest in presenting, and adult viewers and listeners have a First Amendment interest in receiving. The government's effective prohibition of such speech—by channeling it to hours when it is unavailable to the majority of adults—implicates serious First Amendment concerns. The prohibition encompasses news broadcasts, dramas on subjects such as the AIDS epidemic, and live "talk" shows on radio.[13] It affects the programming decisions that broadcasters make every day at the 11,965 radio stations and 1,542 television stations across the country.[14] It thus affects the material available to tens of millions of adult viewers and listeners, many of whom rely upon the broadcast medium as their principal source of news and entertainment.

The decision below sustaining a 6 a.m.-to-10 p.m. indecency ban cannot be reconciled with decisions of this Court, including its emphatically narrow holding in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). The Court of Appeals failed to subject Section 16(a) to the rigorous analysis that this Court requires in the First Amendment area. The court did not make the requisite "independent" assessment of the constitutionality of the statute, but instead simply deferred to the assessment of Congress and the FCC. The court did not demand that the government make a factual showing, as this Court has required, that the statute is directed at "real" harms and is narrowly tailored.

The Court of Appeals also misconceived the relevant governmental and First Amendment interests implicated by Section 16(a). The government has no "independent" interest in protecting children from "indecent" material. Nor does the government have any interest in determining

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[13] The court below sought to equate broadcast indecency to "hard-core pornography." App. 11a. There is no evidence in the record that the material that the FCC has deemed "indecent" in the broadcast medium remotely constitutes "hard-core pornography."

[14] News Release, Federal Communications Commission (Sept. 8, 1995).

how parents should supervise their children's television viewing and radio listening. The court also improperly dismissed adult viewers' and listeners' interest in receiving "indecent" broadcasts, relying, contrary to the decisions of this Court, on the supposed availability of similar material in other media.

Finally, in holding that the FCC's definition of "indecency" is not unconstitutionally vague, the Court of Appeals again acted contrary to the decisions of this Court. The issue was not, as the court below held, decided by *Pacifica*. The First Amendment requires that the government provide a clear and precise definition of what speech it seeks to proscribe. Here, given the narrowness of the safe harbor provided by Section 16(a), such precision is particularly important.

I. IN DEFERRING TO CONGRESS AND FAILING TO REQUIRE EVIDENCE TO SUPPORT THE INDECENCY BAN, THE DECISION BELOW IS IN FUNDAMENTAL CONFLICT WITH DECISIONS OF THIS COURT.

The indecency ban embodied in Section 16(a) is a content-based restriction on speech and, accordingly, may be sustained only if it advances a "compelling interest" by "the least restrictive means." *Sable Communications of Calif., Inc. v. FCC*, 492 U.S. 115, 126 (1989). The Court of Appeals recognized that *Sable* provided the appropriate First Amendment standard under which Section 16(a) was to be scrutinized. App. 9a. However, rather than independently assessing whether the government's ends were compelling and whether the government's means were narrowly tailored, the court deferred to Congress's and the FCC's assessments, without requiring any evidence to support them. As this Court has made clear, such deference is improper in the First Amendment area.

In explaining how courts are to analyze statutes challenged on First Amendment grounds, the Court has articu-

lated two related principles, both of which are critical here:

First, a court cannot unquestioningly accept legislative findings on the constitutionality of a statute. Instead, the court has an "obligation to exercise independent judgment when First Amendment rights are implicated." *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2471 (1994) (plurality opinion); *accord Sable*, 492 U.S. at 129; *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973). "Were it otherwise," as the Court has explained, "the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 844 (1978); *accord Whitney v. California*, 274 U.S. 357, 378-79 (1927) (Brandeis, J. concurring).

Hence, in *Sable*, this Court refused to defer to Congress's assessment that the government's interest in restricting children's access to indecent dial-a-porn would not adequately be served by anything less than a total ban. *See* 492 U.S. at 128. The Court explained that "whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law." *Id.* at 129. The Court ultimately reached its own conclusion—contrary to that of Congress—as to whether the statute was narrowly tailored enough to satisfy the First Amendment. *Id.* at 129-31.

Second, a court cannot allow the government to rest on "mere speculation or conjecture" in order to justify a statute restricting speech. *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993); *see Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) (courts "may not simply assume that [a statute] will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity"). Instead, the government must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a

material degree." *Edenfield*, 113 S. Ct. at 1800; *accord Turner*, 114 S. Ct. at 2470 (plurality opinion).

In *Edenfield*, for example, the Court invalidated a state law that restricted the commercial speech of certified public accountants by prohibiting them from engaging in person-to-person solicitation of prospective clients. The Court acknowledged that the government interests advanced in support of the ban—to prevent fraud or invasion of privacy by CPAs and to assure the independence of CPAs who audit businesses—were "substantial in the abstract." 113 S. Ct. at 1799-1800. But the Court held that the Board had failed to meet its burden of demonstrating that CPAs' solicitation of prospective clients did, in fact, "create[] the dangers of fraud, overreaching, or compromised independence that the Board claims to fear." *Id.* at 1800. The Court stressed that the Board had presented "no studies," or even "any anecdotal evidence," to suggest that CPA soliciation posed these dangers. *Id.*; *see Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1593 (1995) (noting that "[t]he Government did not offer any convincing evidence" that statute served to advance its interests); *FCC v. League of Women Voters*, 468 U.S. 364, 391 (1984) (rejecting government's asserted interest as "speculative at best").

Here, in sustaining the 6 a.m.-to-10 p.m. indecency ban, the Court of Appeals violated both principles. The court did not exercise its "independent judgment," but instead deferred to the judgment of Congress and the FCC. *Sable*, 492 U.S. at 129. Nor did the court require the government to substantiate its need for an indecency ban as sweeping as that contained in Section 16(a). It simply accepted the government's invitation to engage in "speculation or conjecture" as to whether Section 16(a) is directed at "real" harms and is narrowly tailored. *Edenfield*, 113 S. Ct. at 1800. The court's departure from the approach mandated by this Court is reflected in its treatment of three critical questions.

A. The Court Failed To Require Proof Of Any Harm To Children From "Indecent" Broadcasts.

The Court of Appeals did not require Congress or the FCC to make *any* factual showing that children suffer psychological harm from exposure to broadcasts that, although "indecent," are not obscene as to either children or adults. Instead, the court held that Congress could simply assume that exposure to indecency might cause "the coarsening of impressionable minds," without supporting such an assumption with "the testimony of psychiatrists and social scientists" or, apparently, anyone else. App. 16a-17a. However, in the absence of any evidence demonstrating that children are, in fact, injured by exposure to "indecent" broadcasts, the court could not properly have concluded that "the harms [the government] recites are real." *Edenfield*, 113 S. Ct. at 1800. The court's analysis was squarely contrary to that employed by this Court in a long line of cases that includes *Edenfield*, *Coors*, and the *Turner* plurality opinion.[18]

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[18] The Court of Appeals asserted on the basis of *Ginsberg v. New York*, 390 U.S. 629 (1968), that "a scientific demonstration of psychological harm is [not] required in order to establish the constitutionality of measures protecting minors from exposure to indecent speech." App. 14a. The court's reliance on *Ginsberg* is misplaced for several reasons. First, *Ginsberg* was concerned with material that was obscene, and thus not constitutionally protected, as to minors. No suggestion has been made that "indecent" broadcasts of the sort at issue here are obscene as to either adults or minors. Second, *Ginsberg* predated this Court's decisions in *Landmark*, *Sable*, and other cases that made clear that "'[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.'" *Sable*, 492 U.S. at 129 (quoting *Landmark*, 435 U.S. at 843). Third, whereas the statute in *Ginsberg* did not restrict adults' access to the variably obscene publications, Section 16(a) restricts adults' access to "indecent" broadcasts. A stronger showing of harm is required of the government in these circumstances. *See, e.g.*, *Sable*, 492 U.S. at 128 (government must take care not to "reduce the adult population . . . to . . . only what is fit for children") (internal quotations and citations omitted).

The court's failure to demand evidence of any "real," as opposed to merely "speculative," harm from exposure to indecent broadcasts was criticized by the four dissenting judges. As Chief Judge Edwards observed:

> It is easy to assume that there must be ill effects from exposing children, and especially young ones, to indecent material, but Supreme Court doctrine suggests that we must check our assumptions. And with respect to exposure to broadcast indecency and the impact on children, we have yet to unearth any ill effects.

App. 55a-56a (Edwards, J., dissenting). He pointed out that no "evidence of a link between exposure to indecency and harm to children" had been offered by the congressional sponsors of Section 16(a). Judge Wald similarly noted that the record contained "no evidence at all of psychological harm from exposure to indecent programs." App. 73a (Wald, J., dissenting).

Indeed, the record contained substantial evidence to the contrary: a comprehensive analysis of the empirical data on the subject that was prepared by three nationally recognized authorities on the psychological effects of television and radio. These authorities concluded that the existing studies do not show that children are affected at all—much less in a harmful way—by exposure to the material that the FCC has deemed "indecent" in the broadcast context.

B. The Court Failed To Require Proof Of Children's Exposure To "Indecent" Broadcasts.

The Court of Appeals also failed to require the government to demonstrate that appreciable numbers of children would, in fact, watch or listen to "indecent" broadcasts in the absence of Section 16(a). This showing was also necessary in order to determine, consistent with this Court's authorities, whether "the harms [the government] recites are real." *Edenfield*, 113 S. Ct. at 1800. The reason is obvious: Even if the government's concerns that

children would be harmed by exposure to "indecent" broadcasts were valid in the abstract, no such harm would exist if children were not, in fact, viewing or listening to such broadcasts. *See id.* (government's "abstract" concerns about harm are insufficient to justify restrictions on speech); *accord Turner*, 114 S. Ct. at 2470 (plurality opinion).[16]

Yet, the court allowed the government simply to rely on statistics on the number of children in the overall television and radio audience. *See* App. 22a-23a. These statistics say nothing about how many children—if any at all—would be watching or listening to "indecent" programs if they were available. The court did not, for example, require the government to show that there were any children at all in the audiences of particular programs deemed to be "indecent." Especially given that an 8 p.m.-to-6 a.m. safe harbor has been in effect since 1989—ever since the Court of Appeals stayed the 24-hour-a-day indecency ban in *ACT II*—the government should have been required to provide such information.

The court sought to excuse the absence of data on the number of children in the audience for "indecent" radio or television programs on the supposition that "[c]hildren will not likely record, in a Nielsen diary or other survey, that they listen to or view programs of which their parents disapprove." *Id.* at 23a. But no data were offered by the government, or otherwise cited by the court, to substitute the court's theory that children would falsely deny watching or listening to such programs.[17]

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[16] The FCC has acknowledged that broadcasters have supplied data in individual indecency enforcement proceedings "demonstrat-[ing] that few or no children were likely to have been listening to their particular station or program when the alleged indecent material was aired." App. 184a (1993 Report and Order).

[17] The court also contended that "children's grazing"—that is, rapidly tuning from station to station—would render station- or program-specific data on children's viewing unreliable. App. 23a. Again, however, the record contains no data establishing that

This absence of any record evidence of children's exposure to "indecent" broadcasts was noted by the dissenters in the Court of Appeals. As Judge Wald pointed out:

> We have not a scintilla of evidence as to how many allegedly indecent programs have been either aired or seen or heard by children inside or outside the safe harbor. Thus, even if the government were allowed to presume harm from mere exposure to indecency, surely it cannot progressively constrict the safe harbor in the absence of *any* indication that the presumed harm is even occurring under the existing regime.

App. 70a (Wald, J., dissenting); *see* App. 61a (Edwards, J., dissenting) ("The Commission presents no program-specific data of what children watch, despite the existence of this data.").

C. The Court Failed To Require Proof That Section 16(a) Is Narrowly Tailored.

The Court of Appeals also failed to require the government to demonstrate that Section 16(a) is "narrowly drawn" to avoid "unnecessarily interfering with First Amendment freedoms." *Sable*, 492 U.S. at 126 (quotation omitted). Instead, the court expressly stated that "we defer to Congress's determination of where to draw the line" as to which hours to include within the indecency ban. App. 26a.

This was contrary to the "independent judgment" mandated by this Court in *Sable* of "the facts bearing on an issue of constitutional law." 492 U.S. at 129. Indeed, as in *Sable* itself, there were "no legislative findings" that could justify a conclusion that the statute was narrowly tailored. *Id.* Section 16(a), like the ban on indecent

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"grazing," to the extent that it occurs at all among children, results in significant unrecorded exposure to "indecent" programs. *See* App. 73a (Wald, J., dissenting) ("There is no evidence . . . that 'grazing' is leading to any significant viewing of indecency.").

dial-a-porn communications in *Sable*, "was introduced on the floor," and thus was unaccompanied by any "committee report" justifying its breadth and rejecting other alternatives. *Id.* at 130. And as in *Sable*, "[n]o Congressman or Senator purported to present a *considered judgment* with respect to how often or to what extent minors could or would circumvent" a narrower restriction. *Id.* (emphasis added).

The Court of Appeals should have required the government, in accordance with this Court's authorities, to demonstrate why a narrower indecency ban would not suffice. But the court did not demand any such showing. As Chief Judge Edwards noted:

> [T]he Government offers no data on actual parental supervision, parental preferences, or on the effectiveness of parental supervision at different hours of the day and night. . . . Without this kind of data, the Commission's decision to ban indecent broadcasting during the extensive period here in question is not narrowly tailored to serve the asserted interest of facilitating parental supervision.

App. 61a (Edwards, J., dissenting).[18]

The court did not demand any showing that, for example, problems requiring government intervention had arisen during the existing 8 p.m.-to-6 a.m. safe harbor. According to survey evidence submitted in the FCC rulemaking on Section 16(a) and included in the record below, 98% of persons under 18 are with parents or other adults, at school, or asleep during that period. Yet, the court did require the government to show that adult supervision, as opposed to official censorship, was inadequate to shield young people from "indecent" broadcasts

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[18] The Court of Appeals held on two prior occasions that the FCC had to accumulate these sorts of data in order to justify the scope of its indecency regulation. *See ACT II*, 932 F.2d at 1510; *ACT I*, 852 F.2d at 1341-33. The FCC never conducted the "full and fair" hearing directed by those cases.

after 8 p.m. *See* App. 73a (Wald, J., dissenting) ("the government needs to give more careful consideration to those hours in the evening when parental control could reasonably be relied upon in lieu of censorship"). Nor did the court require any showing that adult supervision would not suffice during those hours when children and teenagers are at school.[19] Indeed, the court conceded that "during school hours . . . children are presumably subject to strict adult supervision," but held that the First Amendment did not require "fine tuning" the indecency ban to exclude those hours.[20]

In sum, the decision below conflicts with this Court's decisions directing that statutes suppressing speech be scrutinized independently and rigorously. The Court's intervention is necessary in order to resolve this conflict.

Aside from whether the decision below accords too much deference to Congress with respect to the constitutionality of a broad indecency ban, the Court should consider whether the decision accords too little deference in effectively rewriting Section 16(a), which was a task "properly left to Congress." *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1019 (1995). After concluding that Section 16(a) was unconstitutional to the extent that certain public broadcasters were allowed to present "indecent" material beginning at 10 p.m., the Court of Appeals did not strike down Section 16(a) as unconstitutional, but instead rewrote the statute to allow all broadcasters to air "indecent" material at 10 p.m. In so doing, the court again acted contrary to this Court's decisions, which have em-

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[19] The survey evidence demonstrated, for example, that more than 99% of all persons under age 18 are with parents or other adults, asleep, or at school throughout the morning "drive-time" hours of 6 a.m. to 10 a.m.

[20] The court also observed that "[t]he Government's concerns, of course, extend to children who are too young to attend school." App. 25a. But no showing was made that parental supervision would be inadequate for such young children.

phasized that the judiciary has no "license . . . to rewrite language enacted by the legislature." *United States v. Albertini*, 472 U.S. 675, 680 (1985); *accord National Treasury Employees Union*, 115 S. Ct. at 1019 & n.26.[21]

II. THE COURT OF APPEALS' EVALUATION OF THE COMPETING INTERESTS IMPLICATED BY SECTION 16(a) CONFLICTS WITH DECISIONS OF THIS COURT.

In identifying and balancing the competing governmental and private interests implicated by Section 16(a), the decision below departs from the decisions of this Court in three critical respects. Each of these departures warrants this Court's review.

A. The Court Of Appeals' Recognition Of An Independent Government Interest In Protecting Children From Indecency Conflicts With *Pacifica* And *Ginsberg*.

The Court of Appeals held that Section 16(a) was justified, in part, by "the Government's own interest in the well-being of minors." App. 12a. But such an interest cannot be reconciled with the decisions of this Court.

This Court has repeatedly recognized "the liberty of parents and guardians to direct the upbringing and education of children under their control." *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *accord Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Meyer v. Nebraska*, 262 U.S. 390 (1923). This includes parents' ability to decide whether, or when, their children may have access to material on sexual topics. Hence, in *Ginsberg v. New York*, 390 U.S. 629 (1968), which upheld a state statute that prohibited the sale to minors of any publication that was deemed obscene as to them, the Court explained that the statute served to "aid discharge"

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[21] *See also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986).

of parents' "primary responsibility for children's well-being." *Id.* at 639. The Court emphasized that the statute "does not bar parents who so desire from purchasing the magazines for their children." *Id.*; *accord Bolger v. Youngs Drug Products*, 463 U.S. 60, 74 (1983).

The Court's concededly "narrow[]" decision in *Pacifica*, which held that the FCC could constitutionally regulate a midday broadcast of George Carlin's "Filthy Words" monologue, does not suggest an independent government interest in protecting children. The Court repeatedly noted that the Carlin monologue had been broadcast in the early afternoon—a time when unsupervised children might be expected to be in the audience—and that the FCC had not foreclosed "indecent" broadcasts during the evening hours. *See, e.g.*, 438 U.S. at 729, 732 & n.5, 750 & n.28.

Indeed, Justices Powell and Blackmun, who were essential to the five-member majority, emphasized that the government's "primary concern was to prevent the broadcast from reaching the ears of *unsupervised children* who were likely to be in the audience at that hour." *Id.* at 757 (Powell, J., concurring) (emphasis added). They found guidance in Judge Leventhal's "thoughtful" dissenting opinion in the Court of Appeals. *Id.* & n.1 (citing *Pacifica Foundation v. FCC*, 556 F.2d 9, 32-35 (D.C. Cir. 1977) (Leventhal, J., dissenting), *rev'd*, 438 U.S. 726 (1978)). Judge Leventhal squarely recognized that the government's interest in regulating indecent broadcasts is to give "the family . . . the means to make th[e] choice" whether children are exposed to them. 556 F.2d at 33. He suggested that indecency regulation could not be so easily justified "when the time of broadcast is such that the great preponderance of children are subject to parental control." *Id.* at 36.

There is thus a fundamental inconsistency between this Court's decisions and the decision below with respect to the governmental interest that may justify the FCC's regulation of "indecency" on television and radio.

B. The Court Of Appeals' Misconception Of The Government's Interest In Aiding Parental Authority Conflicts With This Court's Decisions.

The court below misconceived the nature of the other governmental interest that it relied upon to justify Section 16(a): the government's interest in "supporting parental supervision of children." App. 17a. As this Court's decisions in *Meyer*, *Pierce*, and *Yoder* recognize, different parents have different approaches to child-rearing. The government's proper interest is in accommodating these varying approaches. It is not in dictating which approach to child-rearing is the proper one for all parents and all children.

The FCC and the court below assumed that there is only one proper way for parents to exert authority over their children's viewing and listening: to remain in the same room with their children while they are watching television or listening to the radio, and thereby to make sure that their children do not switch the dial to a program containing "indecent" material. That assumption is at the heart of the government's rationale for a broad indecency ban and at the heart of the Court of Appeals' decision. The indecency ban is designed to spare parents from engaging in "co-viewing" or "co-listening"—even during hours when they are present in the home—by simply removing "indecent" programs from the airwaves.

The FCC and the court failed to recognize that parental supervision over children's exposure to the broadcast medium may appropriately take many forms. Some parents indeed choose to view or listen with their children. Others install blocking devices on their television sets, or prevent children from having televisions or radios in their own rooms. Others set rules for their children's use of television and radio, without constantly monitoring what programs their children are selecting. There is no basis in the record to conclude that parents cannot engage in meaningful supervision by any of these means during the many hours of the day when they are present

in the home. Nor does *Pacifica* provide any support for such a conclusion. Yet, Congress, the FCC, and the court below have denied parents the opportunity to use these means of supervision—means that leave open the opportunity for adults to watch or listen to "indecent" programs at reasonable hours.

As Chief Judge Edwards noted below, "the FCC has preempted, not facilitated, parental control in enforcing section 16(a)." [22] And "preempt[ing] . . . parental control" is precisely what *Meyer*, *Pierce*, and *Yoder* forbid. The Court should grant review in order to resolve this conflict.

C. The Court Of Appeals' Heavy Reliance On The Availability Of Indecency In Other Media Conflicts With *Bolger* And *Shad*.

The Court of Appeals acknowledged that Section 16(a) "burden[s] the rights of many adults." App. 24a. Yet, even though the court recognized that Section 16(a) would deprive adults of access to "indecent" material in the broadcast medium, the court nonetheless upheld the statute, because "adults have alternative means of satisfying their interest in indecent material . . . in ways that pose no risk to minors." *Id.* at 24a. The court's reliance on the availability of indecency in other media is contrary to the decisions of this Court.

This Court has recognized on a number of occasions that a content-based restriction on speech cannot be justified on the ground that the same or similar material is available elsewhere. In *Bolger*, for example, the Court rejected the government's argument that a prohibition on the mailing of contraceptive advertisements "does not interfere 'significantly' with free speech because the statute applies only to unsolicited mailings and does not bar other channels of communication." 463 U.S. at 69 n.18. The Court relied on the well-settled principle that " 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be

[22] App. 55a-56a (Edwards, J., dissenting).

exercised in some other place.'" *Id.* at 69-70 n.18 (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)); *see Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n.15 (1976) (restrictions on speech cannot be justified merely because "the speaker's listeners could come by his message by some other means"); *Shad v. Borough of Mount Ephraim*, 452 U.S. 61, 76-77 (1981); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975).[23]

Not only was the Court of Appeals reliance on adults' "alternative means of satisfying their interest in indecent material" erroneous under this Court's decisions. It was also erroneous as a matter of fact. Much of the material at issue here—news and documentaries, topical "talk" shows, and dramatic and satiric programs—is not readily available in other media. In fact, the FCC's indecency regulation has been directed in recent years almost exclusively at live radio programs, which have no analogue outside the broadcast medium, whether one considers the general program format or the individual program content.

The court's reliance on adults' ability to obtain "indecent" material from non-broadcast sources cannot be justified by *Pacifica*. To be sure, the Court observed in that case that "[a]dults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear these words." 438 U.S. at 750 n.28; *see id.* at 760 (Powell, J., concuring). As noted above, unlike the Carlin monologue in *Pacifica*, most of the material that the FCC has deemed "indecent" is not available in other media. More significantly, *Pacifica* did not suggest that adults may effectively be denied "indecent" material on radio and television simply because "indecent" material is available elsewhere. Instead, *Pacifica* emphasized adults' ability to obtain the Carlin monologue and other "inde-

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[23] This principle of First Amendment law has been recognized by other Circuits. *See, e.g., Crowder v. Housing Auth. of City of Atlanta*, 990 F.2d 586, 593 (11th Cir. 1993); *Hobbs v. Hawkins*, 968 F.2d 471, 481 (5th Cir. 1992).

cent" material on television and radio during the evening hours. *See id.* at 750 n.28, 760.[24]

Accordingly, the Court should grant certiorari in order to resolve the conflict between its own decisions and the decision below concerning the governmental and private interests implicated by Section 16(a).

III. IN HOLDING THAT THE FCC'S DEFINITION OF "INDECENCY" IS NOT UNCONSTITUTIONALLY VAGUE, THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF THIS COURT.

The Court of Appeals summarily rejected petitioners' vagueness challenge to the FCC's definition of broadcast indecency based on its earlier decision in *ACT I*. App. 8a-9a.[25] The court's decision did not rest on the merits of petitioners' position, but on its view that this Court in *Pacifica* " 'dispelled any vagueness concerns attending the [Commission's] definition.' " *Id.* (quoting *ACT II*, 932 F.2d at 1508); *accord ACT I*, 852 F.2d at 1339. The court's treatment of the vagueness issue reflects a misunderstanding of this Court's authorities.

Pacifica was concerned only with the FCC's specific ruling that the Carlin monologue in that case was indecent. The FCC had made clear that it was *not* purporting to articulate a standard of general applicability. *See Pacifica Foundation*, 56 F.C.C.2d 94, 99 (1975). This Court, in turn, made clear that it was not deciding the broader question of the constitutionality of the indecency definition. Justice Stevens, writing for the majority, stated that the FCC's order "was issued in a specific factual con-

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[24] In any event, *Pacifica* predated the Court's decision in *Bolger*, which clarified that a content-based ban on speech cannot be sustained on the ground that "other channels of communication" remain open. 463 U.S. at 69 n.18.

[25] The FCC defines broadcast indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." App. 113a n.10 (1993 Report and Order).

text," that "questions concerning possible action in other contexts were expressly reserved for the future," and that the FCC's "specific holding was carefully confined to the monologue 'as broadcast.'" *Pacifica*, 438 U.S. at 734; *see id.* at 742 (the Court's "review is limited to the question whether the Commission has the authority to proscribe this particular broadcast") (plurality opinion). In his separate concurrence, Justice Powell similarly noted that "[t]he Court today reviews only the Commission's holding that Carlin's monologue was indecent 'as broadcast.'" *Id.* at 755 (opinion of Powell, J.). He further explained that the Court was not addressing broader questions raised by the FCC's indecency regulation, "consistent with our settled practice of not deciding constitutional issues unnecessarily." *Id.* at 756.

While in the years immediately after *Pacifica*, the FCC provided significant clarity by limiting "indecency" to the words in the Carlin monologue, the FCC's indecency regulation since 1987 has reintroduced confusion. The FCC's orders have been typically conclusory, frequently inconsistent,[26] and generally incapable of providing significant guidance to broadcasters. Moreover, the FCC has instructed that because its indecency orders are "highly fact-specific" and are made "on a case-by-case basis," broadcasters cannot rely on them "unless both the substance of the material they aired *and* the context in which it was broadcast were susbtantially similar." *Sagittarius Broadcasting Corp.*, 7 F.C.C.R. 6873, 6874 (MMB 1992). As Judge Wald noted below, "conscientious broadcasters and radio and television hosts seeking to steer clear of indecency face the herculean task of predicting on the basis of a series of hazy case-by-case determinations by the Commission which side of the line their program will fall on." App. 67a (Wald, J., dissenting).

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[26] *Compare WCKS Broadcasters, Ltd.*, Notice of Apparent Liability, 9 F.C.C.R. 4871 (MMB 1994) (advertisements that rock radio station "keeps it harder, longer") *with* Letter to Julie Magnell (Oct. 26, 1989) (rejecting complaint concerning song "Slip It In").

This Court has elsewhere demanded that speakers be given clear and precise guidance as to which speech is proscribed so that they do not " 'steer far wider of the unlawful zone' " than necessary. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)); *see Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). The Court has repeatedly struck down statutes that sought to regulate sexually explicit speech as unconstitutionally vague. For example, in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), the Court held unconstitutional a state law that created a Commission that was to "educate the public concerning [materials] containing obscene, indecent or impure language, or manifestly tending to the corruption of the youth." *Id.* at 59. Finding that the law was unconstitutionally vague and that the Commission had done nothing to make it more precise, the Court explained that "[t]he distributor is left to speculate whether the Commission considers his publication obscene or simply harmful to juvenile morality." *Id.* at 71. And in *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972), the Court summarily vacated and remanded a conviction under a disorderly persons statute that prohibited the use of "offensive," "profane," or "indecent" language in a public place.[27]

The Court has not made clear whether the same vagueness standards apply to the electronic media. The federal courts of appeals are divided on the subject. The Tenth Circuit has upheld a district court's determination that a state statute prohibiting "indecent material" on cable tele-

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[27] *See also, e.g., Brown v. Oklahoma*, 408 U.S. 914 (1972) (summarily vacating and remanding conviction under statute barring "any obscene or lascivious language or word in any public place or in the presence of females"); *Lewis v. City of New Orleans*, 408 U.S. 913 (1972) (summarily vacating and remanding conviction under breach of peace statute prohibiting wantonly cursing, reviling, or using "obscene or opprobrious language" toward police officers); *Cohen v. California*, 403 U.S. 15, 19 (1971) (statute that prohibited "offensive" speech and conduct did not provide sufficient notice "that certain kinds of otherwise permissible speech or conduct would nevertheless . . . not be tolerated in certain places").

vision was " 'unconstitutionally overbroad and vague.' " *Jones v. Wilkinson*, 800 F.2d 989, 990 (10th Cir. 1986) (per curiam) (quoting *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099, 1117 (D. Utah 1985)), *aff'd mem.*, 480 U.S. 926 (1987). Two circuits have rejected vagueness challenges to the term "indecent" in the federal dial-a-porn statute, relying in significant part on the D.C. Circuit's holding in *ACT I* that *Pacifica* resolved the issue. *See Dial Information Servs. v. Thornburgh*, 938 F.2d 1535, 1541 (2d Cir. 1991), *cert. denied*, 502 U.S. 1072 (1992); *Information Providers' Coalition for Defense of First Amendment v. FCC*, 928 F.2d 866, 875 (9th Cir. 1991).[28]

The Court should grant certiorari in order to consider whether the FCC's regulation of broadcast indecency, under a definition that the Court of Appeals previously recognized to be "inherent[ly]" vague, *ACT I*, 852 F.2d at 1344, can be reconciled with *Bantam Books* and similar authorities. The Court's resolution of this issue is especially important given the narrow safe harbor sustained by the court below.

CONCLUSION

The petition for writ of certiorari should be granted.

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[28] *See also United States v. Evergreen Media Corp. of Chicago*, 832 F. Supp. 1183, 1187 (N.D. Ill. 1993) (rejecting vagueness challenge to FCC's definition of "indecency" based on *ACT I* and *ACT II*).

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APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 93-1092, 93-1100

ACTION FOR CHILDREN'S TELEVISION; AMERICAN CIVIL LIBERTIES UNION; THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.; CAPITAL CITY/AMERICAN BROADCASTING CO., INC.; CBS, INC.; FOX TELEVISION STATIONS, INC.; GREATER MEDIA, INC.; INFINITY BROADCASTING CORPORATION; MOTION PICTURE ASSOCIATION OF AMERICA, INC.; NATIONAL ASSOCIATION OF BROADCASTERS; NATIONAL PUBLIC RADIO; PEOPLE FOR THE AMERICAN WAY; POST-NEWSWEEK STATIONS, INC.; PUBLIC BROADCASTING SERVICE; RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; SOCIETY OF PROFESSIONAL JOURNALISTS,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA,

Respondents.

PACIFICA FOUNDATION; NATIONAL FEDERATION OF COMMUNITY BROADCASTERS; AMERICAN PUBLIC RADIO; NATIONAL ASSOCIATION OF COLLEGE BROADCASTERS; INTERCOLLEGIATE BROADCAST SYSTEM; PEN AMERICAN CENTER; ALLEN GINSBERG,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA,

Respondents.

Petitions for Review of an Order of the
Federal Communications Commission

Decided June 30, 1995

Before EDWARDS, Chief Judge, and WALD, SILBERMAN, BUCKLEY, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, and TATEL, Circuit Judges.

Opinion for the court filed by Circuit Judge BUCKLEY, in which Circuit Judges SILBERMAN, STEPHEN F. WILLIAMS, GINSBURG, SENTELLE, KAREN LeCRAFT HENDERSON, and RANDOLPH concur.

Dissenting opinion filed by Chief Judge HARRY T. EDWARDS.

Dissenting opinion filed by Circuit Judge WALD, in which Circuit Judges ROGERS and TATEL join.

BUCKLEY, Circuit Judge:

We are asked to determine the constitutionality of section 16(a) of the Public Telecommunications Act of 1992, which seeks to shield minors from indecent radio and television programs by restricting the hours within which they may be broadcast. Section 16(a) provides that, with one exception, indecent materials may only be broadcast between the hours of midnight and 6:00 a.m. The exception permits public radio and television stations that go off the air at or before midnight to broadcast such materials after 10:00 p.m.

We find that the Government has a compelling interest in protecting children under the age of 18 from exposure to indecent broadcasts. We are also satisfied that, standing alone, the "channeling" of indecent broadcasts to the hours between midnight and 6:00 a.m. would not unduly burden the First Amendment. Because the distinction

drawn by Congress between the two categories of broadcasters bears no apparent relationship to the compelling Government interests that section 16(a) is intended to serve, however, we find the more restrictive limitation unconstitutional. Accordingly, we grant the petitions for review and remand the cases to the Federal Communications Commission with instructions to revise its regulations to permit the broadcasting of indecent material between the hours of 10:00 p.m. and 6:00 a.m.

I. Background

The Radio Act of 1927 provides that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both." 18 U.S.C. § 1464 (1988). While all obscene speech is indecent, not all indecent speech is obscene. The Supreme Court has defined obscene material as

> works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24, 93 S.Ct. 2607, 2615, 37 L.Ed.2d 419 (1973). In enforcing section 1464 of the Radio Act, the Federal Communications Commission defines "broadcast indecency" as

> language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.

In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, 8 F.C.C.R. 704, 705 n. 10 (1993) ("*1993 Report and Order*"). This definition has remained substantially unchanged since it was first enunciated in *In re Pacifica Foundation*, 56 F.C.C.2d 94, 98 (1975).

While obscene speech is not accorded constitutional protection, "[s]exual expression which is indecent but not obscene is protected by the First Amendment. . . ." *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836, 106 L.Ed.2d 93 (1989). "The Government may, however, regulate the content of [such] constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Id.* Noting that broadcasting has received the most limited First Amendment protection because of its unique pervasiveness and accessibility to children, the Supreme Court has held that the FCC may, in appropriate circumstances, place restrictions on the broadcast of indecent speech. *See FCC v. Pacifica Foundation*, 438 U.S. 726, 750-51, 98 S.Ct. 3026, 3041, 57 L.Ed.2d 1073 (1978) ("when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.").

In *In re Infinity Broadcasting Corp. of Pa.*, 3 F.C.C.R. 930 (1987) ("*Reconsideration Order*"), the Commission reviewed its decisions in three cases: *In re Infinity Broadcasting Corp. of Pa.*, 2 F.C.C.R. 2705 (1987), *In re Pacifica Foundation, Inc.*, 2 F.C.C.R. 2698 (1987), and *In re Regents of the University of California*, 2 F.C.C.R. 2703 (1987). One of these cases involved a morning broadcast; the other two dealt with programs that were aired after 10:00 p.m. In each of them, the agency found that a radio station had introduced particularly offensive pigs into American parlors in violation of section 1464. The offending morning broadcast, for example, contained "explicit references to masturbation, ejaculation, breast size, penis size, sexual intercourse, nudity, urination, oral-genital contact, erections, sodomy, bestiality, menstruation and testicles." *Reconsideration Order*, 3 F.C.C.R. at 932 (internal quotation marks omitted). The remaining two were similarly objectionable. *See id.* at 932-33.

The FCC reaffirmed the Government interest in safeguarding children from exposure to such speech and placed broadcasters on notice that because

> at least with respect to the particular markets involved, available evidence suggested there were still significant numbers of children in the audience at 10:00 p.m. . . . broadcasters should no longer assume that 10:00 p.m. is automatically the time after which indecent broadcasts may safely be aired. Rather, . . . indecent material would be actionable (that is, would be held in violation of 18 U.S.C. § 1464) if broadcast when there is a reasonable risk that children may be in the audience. . . .

Id. at 930-31. The Commission noted, however, that it was its "current thinking" that midnight marked the time after which

> it is reasonable to expect that it is late enough to ensure that the risk of children in the audience is minimized and to rely on parents to exercise increased supervision over whatever children remain in the viewing and listening audience.

Id. at 937 n. 47.

In our review of the *Reconsideration Order* in *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir.1988) ("*ACT I*"), we rejected the argument that the Commission's definition of indecency was unconstitutionally vague and overbroad. *Id.* at 1338-40. But, although we affirmed the declaratory ruling that found portions of the morning broadcast to be in violation of section 1464, *id.* at 1341, we vacated the Commission's rulings with respect to the two post-10:00 p.m. broadcasts. *Id.* In those instances, we considered the findings on which the Commission rested its decision to be "more ritual than real," *id.*, because the Commission had relied on data as to the number of teenagers in the total radio audience rather than the number of them who listened to

the radio stations in question. We were also troubled by the FCC's failure to explain why it identified the relevant age group as children aged 12 to 17 when it had earlier proposed legislation for the protection of only those under 12. *Id.* at 1341-42. We further concluded that "the FCC's midnight advice, indeed its entire position on channeling, was not adequately thought through." *Id.* at 1342.

Two months after our decision in *ACT I*, Congress instructed the Commission to promulgate regulations "enforc[ing] the provisions of . . . section [1464] on a 24 hour per day basis." Pub.L. No. 100-459, § 608, 102 Stat. 2186, 2228 (1988). The Commission complied by issuing a regulation banning all broadcasts of indecent material, which was immediately challenged by Action for Children's Television and others. The following year, we remanded the record to the Commission to enable it to solicit information relevant to the congressionally mandated 24-hour ban; and in 1989, the FCC issued a "Notice of Inquiry" for that purpose. *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 4 F.C.C.R. 8358 (1989) ("*1989 NOI*").

After analyzing the public comment received in response to the *1989 NOI*, the Commission reported its conclusions in *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 5 F.C.C.R. 5297 (1990) ("*1990 Report*"). In the *1990 Report*, the FCC defined the category of persons to be protected under section 1464 as "children ages 17 and under." *Id.* at 5301. It then found that because

> the narrowness with which courts have interpreted "obscenity" has commensurably broadened the range of patently offensive material that could be deemed "indecent" if broadcast . . . [and in light of the evidence] that there is a reasonable risk that significant numbers of children ages 17 and under listen to radio and view television at all times of day and

> night[,] . . . the compelling government interest in protecting children from indecent broadcasts would not be promoted effectively by any means more narrowly tailored than a 24-hour prohibition.

Id. at 5297.

We reviewed the 24-hour ban in *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C.Cir.1991) ("*ACT II*"). We again rejected petitioners' vagueness and overbreadth arguments, but we struck down the total ban on indecent broadcasts because "[o]ur previous holding in *ACT I* that the Commission must identify some reasonable period of time during which indecent material may be broadcast necessarily means that the Commission may not ban such broadcasts entirely." *Id.* at 1509.

Shortly after the Supreme Court denied certiorari in *ACT II*, 503 U.S. 913, 112 S.Ct. 1281, 117 L.Ed.2d 507 (1992), Congress again intervened, passing the Public Telecommunications Act of 1992, Pub.L. No. 102-356, 106 Stat. 949 (1992). Section 16(a) of the Act requires the Commission to

> promulgate regulations to prohibit the broadcasting of indecent programming—
>
> (1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and
>
> (2) between 6 a.m. and 12 midnight on any day for any radio or television broadcasting station not described in paragraph (1).

47 U.S.C. § 303 note (Supp. IV 1992). Pursuant to this congressional mandate, the Commission published a notice of proposed rulemaking, *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 7 F.C.C.R. 6464 (1992), and, in 1993, it issued regulations implementing section 16(a). *1993 Report and Order*, 8 F.C.C.R. at 711; 47 C.F.R. § 73.3999 (1994). These are challenged in the petition now before us.

II. Discussion

Petitioners present three challenges to the constitutionality of section 16(a) and its implementing regulations: First, the statute and regulations violate the First Amendment because they impose restrictions on indecent broadcasts that are not narrowly tailored to further the Government's interest, which petitioners define as the promotion of parental authority by shielding unsupervised children from indecent speech in the broadcast media; second, section 16(a) unconstitutionally discriminates among categories of broadcasters by distinguishing the times during which certain public and commercial broadcasters may air indecent material; and third, the Commission's generic definition of indecency is unconstitutionally vague. Petitioners also assert that our decisions in *ACT I* and *ACT II* compel the rejection of the newly enacted restrictions both because there are insufficient data to justify the new statutory ban and because the Commission continues to include children ages 12 to 17 in the protected class.

The Commission argues that the Government's interests extend beyond facilitating parental supervision to include protecting children from exposure to indecent broadcasts and safeguarding the home from unwanted intrusion by such broadcasts. The Commission asserts that restricting indecent broadcasts to the hours between midnight and 6:00 a.m. is narrowly tailored to achieve these compelling governmental interests. It defends the exception allowing public stations that go off the air at or before midnight to broadcast such materials after 10:00 p.m. on the basis that these stations would otherwise have no opportunity to air indecent programs.

At the outset, we dismiss petitioners' vagueness challenge as meritless. The FCC's definition of indecency in the new regulations is identical to the one at issue in *ACT II*, where we stated that "the Supreme Court's decision in *Pacifica* dispelled any vagueness concerns attending

the [Commission's] definition," as did our holding in *ACT I.* 932 F.2d at 1508. Petitioners fail to provide any convincing reasons why we should ignore this precedent.

We now proceed to petitioners' remaining constitutional arguments.

A. The First Amendment Challenge

It is common ground that "[s]exual expression which is indecent but not obscene is protected by the First Amendment." *Sable*, 492 U.S. at 126, 109 S.Ct. at 2836. The Government may, however,

> regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.

Id. Thus, a restriction on indecent speech will survive First Amendment scrutiny if the "Government's ends are compelling [and its] means [are] carefully tailored to achieve those ends." *Id.*

The Supreme Court has "long recognized that each medium of expression presents special First Amendment problems. . . . [O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Pacifica*, 438 U.S. at 748, 98 S.Ct. at 3039-40. (citation omitted). The Court has identified two reasons for this distinction that are relevant here:

> First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.

> . . . Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. . . .
>
> Second, broadcasting is uniquely accessible to children. . . . Other forms of offensive expression may be withheld from the young without restricting the expression of its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children. . . . The ease with which children may obtain access to broadcast material, coupled with the concerns [over the well-being of youths] recognized in *Ginsberg* [*v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968)], amply justifies specific treatment of indecent broadcasting.

Id. at 748-50, 98 S.Ct. at 3040-41. As Justice Powell observed in *Pacifica*,

> [t]he difficulty is that . . . a physical separation of the audience [such as that possible in bookstores and movie theaters] cannot be accomplished in the broadcast media. . . . This . . . is one of the distinctions between the broadcast and other media . . . [that] justif[ies] a different treatment of the broadcast media for First Amendment purposes.

438 U.S. at 758-59, 98 S.Ct. at 3045 (Powell, J., concurring in part and concurring in the judgment). Despite the increasing availability of other means of receiving television, such as cable (which is not immune to the concerns we address today, *see Alliance for Community Media v. FCC*, 56 F.3d 105, 123-125 (D.C.Cir.1995)), there can be no doubt that the traditional broadcast media are properly subject to more regulation than is generally permissible under the First Amendment.

Unlike cable subscribers, who are offered such options as "pay-per-view" channels, broadcast audiences have no

choice but to "subscribe" to the entire output of traditional broadcasters. Thus they are confronted without warning with offensive material. *See Pacifica,* 438 U.S. at 748-49, 98 S.Ct. at 3039-40. This is "manifestly different from a situation" where a recipient "seeks and is willing to pay for the communication. . ." *Sable,* 492 U.S. at 128, 109 S.Ct. at 2837; *see also Cruz v. Ferre,* 755 F.2d 1415, 1420 (11th Cir.1985) (distinguishing *Pacifica* from cases in which cable subscriber affirmatively elects to have specific cable serivce come into home).

In light of these differences, radio and television broadcasts may properly be subject to different—and often more restrictive—regulation than is permissible for other media under the First Amendment. While we apply strict scrutiny to regulations of this kind regardless of the medium affected by them, our assessment of whether seciton 16(a) survives that scrutiny must necessarily take into account the unique context of the broadcast medium.

1. *The compelling Government interests*

In examining the Government's interests in protecting children from broadcast indecency, it is important to understand that hard-core pornography may be deemed indecent rather than obscene if it is "not patently offensive" under the relevant contemporary community standards. The Second Circuit, for example, has found that the "detailed portrayals of genitalia, sexual intercourse, fellatio, and masturbation" contained in a grab bag of pornographic materials (which included such notorious films as "Deep Throat") are not obscene in light of the community standards prevailing in New York City. *United States v. Various Articles of Obscene Merchandise, Schedule No. 2102,* 709 F.2d 132, 134, 137 (2d Cir.1983). Therefore, as Justice Scalia has observed,

> [t]he more narrow the understanding of what is "obscene," and hence the more pornographic what is embraced within the residual category of "inde-

> cency," the more reasonable it becomes to insist upon greater assurance of insulation from minors.

Sable, 492 U.S. at 132, 109 S.Ct. at 2840 (Scalia, J., concurring).

The Commission identifies three compelling Government interests as justifying the regulation of broadcast indecency: support for parental supervision of children, a concern for children's well-being, and the protection of the home against intrusion by offensive broadcasts. Because we find the first two sufficient to support such regulation, we will not address the third.

Petitioners do not contest that the Government has a compelling interest in supporting parental supervision of what children see and hear on the public airwaves. Indeed, the Court has repeatedly emphasized the Government's fundamental interest in helping parents exercise their "primary responsibility for [their] children's well-being" with "laws designed to aid [in the] discharge of that responsibility." *Ginsberg v. New York*, 390 U.S. 629, 639, 88 S.Ct. 1274, 1280, 20 L.Ed.2d 195 (1968). This interest includes "supporting parents' claim to authority in their own household" through "regulation of otherwise protected expression." *Pacifica*, 438 U.S. at 749, 98 S.Ct. at 3040 (internal quotation marks omitted).

Although petitioners disagree, we believe the Government's own interest in the well-being of minors provides an independent justification for the regulation of broadcast indecency. The Supreme Court has described that interest as follows:

> It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens. Accordingly, we have sustained legislation aimed at protecting the physical

> and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.

New York v. Ferber, 458 U.S. 747, 756-57, 102 S.Ct. 3348, 3354, 73 L.Ed.2d 1113 (1982) (internal quotation marks and citations omitted); *see also Prince v. Massachusetts*, 321 U.S. 158, 165, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944) ("It is [in] the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed . . . citizens.").

While conceding that the Government has an interest in the well-being of children, petitioners argue that because "no causal nexus has been established between broadcast indecency and any physical or psychological harm to minors," Joint Brief for Petitioners at 32, that interest is "too insubstantial to justify suppressing indecent material at times when parents are available to supervise their children." *Id.* at 33. That statement begs two questions: The first is how effective parental supervision can actually be expected to be even when parent and child are under the same roof; the second, whether the Government's interest in the well-being of our youth is limited to protecting them from clinically measurable injury.

As Action for Children's Television argued in an earlier FCC proceeding, "parents, no matter how attentive, sincere or knowledgeable, are not in a position to really exercise effective control" over what their children see on television. *In re Action for Children's Television*, 50 F.C.C.2d 17, 26 (1974). This observation finds confirmation from a recent poll conducted by Fairbank, Maslin, Maullin & Associates on behalf of Children Now. The survey found that 54 percent of the 750 children questioned had a television set in their own rooms and that 55 percent of them usually watched television alone or with friends, but not with their families. Sixty-six percent of them lived in a household with three or more

television sets. *Compare 1989 NOI*, 4 F.C.C.R. at 8361 (63 percent of households own more than one television and 50 percent of teenagers have a television in own bedrooms). Studies described by the FCC in its 1989 Notice of Inquiry suggest that parents are able to exercise even less effective supervision over the radio programs to which their children listen. According to these studies, each American household had, on average, over five radios, and up to 80 percent of children had radios in their own bedrooms, depending on the locality studied, *id.*; two-thirds of all children ages 6 to 12 owned their own radios, more than half of whom owned headphone radios. *Id.* at 8363. It would appear that Action for Children's Television had a firmer grasp of the limits of parental supervision 20 years ago than it does today.

With respect to the second question begged by petitioners, the Supreme Court has never suggested that a scientific demonstration of psychological harm is required in order to establish the constitutionality of measures protecting minors from exposure to indecent speech. In *Ginsberg*, the Court considered a New York State statute forbidding the sale to minors under the age of 17 of literature displaying nudity even where such literature was "not obscene for adults. . . ." 390 U.S. at 634, 88 S.Ct. at 1278. The Court observed that while it was "very doubtful" that the legislative finding that such literature impaired "the ethical and moral development of our youth" was based on "accepted scientific fact," a causal link between them "had not been disproved either." *Id.* at 641-42, 88 S.Ct. at 1281-82. The Court then stated that it "d[id] not demand of legislatures scientifically certain criteria of legislation. We therefore cannot say that [the statute] . . . has no rational relation to the objective of safeguarding such minors from harm." *Id.* at 642-43, 88 S.Ct. at 1282 (internal quotation marks and citations omitted).

In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 684, 106 S.Ct. 3159, 3164-65, 92 L.Ed.2d 549 (1986), the Court did not insist on a scientific demonstration of psychic injury when it found that there was a compelling governmental interest in protecting high school students from an indecent speech at a high school assembly. It noted that its prior cases "recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech." *Id.* In *Bethel School District* and *Ginsberg*, of course, the protection of children did not require simultaneous restraints on the access of adults to indecent speech. The Court, however, has made it abundantly clear that the Government's interest in the "well-being of its youth" justified special treatment of indecent broadcasting. *Pacifica*, 438 U.S. at 749-50, 98 S.Ct. at 3040-41 ("The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting."); *see also Sable*, 492 U.S. at 131, 109 S.Ct. at 2839 ("compelling interest [in] preventing minors from being exposed to indecent telephone messages").

Finally, we think it significant that the Supreme Court has recognized that the Government's interest in protecting children extends beyond shielding them from physical and psychological harm. The statute that the Court found constitutional in *Ginsberg* sought to protect children from exposure to materials that would "impair[] [their] *ethical and moral* development." 390 U.S. at 641, 88 S.Ct. at 1282 (emphasis added). Furthermore, although the Court doubted that this legislative finding "expresse[d] an accepted scientific fact," *id.*, it concluded that the legislature could properly support the judgment of

> parents and others, teachers for example, who have [the] primary responsibility for children's well-being

> . . . [by] . . . assessing sex-related material harmful to minors according to prevailing standards in the adult community as a whole with respect to what is suitable material for minors.

Id. at 639, 88 S.Ct. at 1280 (internal quotation marks omitted).

The Court noted, in the context of obscenity, that

> [i]f we accept the well nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality, and develop character, can we then say that a . . . legislature may not act on the corollary assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior . . . The sum of experience . . . affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63, 93 S.Ct. 2628, 2638, 37 L.Ed.2d 446 (1973). Congress does not need the testimony of psychiatrists and social scientists in order to take note of the coarsening of impressionable minds that can result from a persistent exposure to sexually explicit material just this side of legal obscenity. The Supreme Court has reminded us that society has an interest not only in the health of its youth, but also in its quality. *See Prince*, 321 U.S. at 168, 64 S.Ct. at 443 ("A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."). As Irving Kristol has observed, it follows "from the proposition that democracy is a form of self-government, . . . that if you want it to be a meritorious polity, you have to care

about what kind of people govern it." Irving Kristol, *On the Democratic Idea in America* 41-42, Harper & Row (1972).

We are not unaware that the vast majority of States impose restrictions on the access of minors to material that is not obscene by adult standards. *See 1989 NOI*, 4 F.C.C.R. at 8368-72. In light of Supreme Court precedent and the social consensus reflected in state laws, we conclude that the Government has an independent and compelling interest in preventing minors from being exposed to indecent broadcasts. *See Sable*, 492 U.S. at 126, 109 S.Ct. at 2836 (Government's compelling interest in well-being of minors extends "to shielding [them] from the influence of literature that is not obscene by adult standards").

Petitioners argue, nevertheless, that the Government's interest in supporting parental supervision of children and its independent interest in shielding them from the influence of indecent broadcasts are in irreconcilable conflict. The basic premise of this argument appears to be that the latter interest potentially undermines the objective of facilitating parental supervision for those parents who wish their children to see or hear indecent material.

The Supreme Court has not followed this reasoning. Rather, it treats the Government interest in supporting parental authority and its "independent interest in the well-being of its youth," *Ginsberg*, 390 U.S. at 640, 88 S.Ct. at 1281, as complementary objectives mutually supporting limitations on children's access to material that is not obscene for adults. *Id.* at 639-40, 88 S.Ct. at 1280-81. And while it is true that the decision in *Ginsberg* "denie[d] to children free access to books . . . to which many parents may wish their children to have uninhibited access," *id.* at 674, 88 S.Ct. at 1298 (Fortas, J., dissenting), as Justice Brennan pointed out in writing for the majority, "the prohibition against sales to minors [did]

not bar parents who so desire[d] from purchasing the [material] for their children." *Id.* at 639, 88 S.Ct. at 1280; *see also Pacifica*, 438 U.S. at 749-50, 98 S.Ct. at 3040-41; *id.* at 769-70, 98 S.Ct. at 3050-51 (Brennan, J., dissenting).

Today, of course, parents who wish to expose their children to the most graphic depictions of sexual acts will have no difficulty in doing so through the use of subscription and pay-per-view cable channels, delayed-access viewing using VCR equipment, and the rental or purchase of readily available audio and video cassettes. Thus the goal of supporting "parents' claim to authority in their own household to direct the rearing of their children," *id.*, is fully consistent with the Government's own interest in shielding minors from being exposed to indecent speech by persons other than a parent. Society "may prevent the general dissemination of such speech to children, leaving to parents the decision as to what speech of this kind their children shall hear and repeat." *Pacifica*, 438 U.S. at 758, 98 S.Ct. at 3045 (Powell, J., concurring in part and concurring in the judgment).

The Government's dual interests in assisting parents and protecting minors necessarily extends beyond merely channeling broadcast indecency to those hours when parents can be at home to supervise what their children see and hear. It is fanciful to believe that the vast majority of parents who wish to shield their children from indecent material can effectively do so without meaningful restrictions on the airing of broadcast indecency.

2. Least restrictive means

The Government may

> regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest. . . . [B]ut to withstand constitutional

> scrutiny, it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms.
>
> *Sable*, 492 U.S. at 126, 109 S.Ct. at 2836-37 (internal quotations marks omitted). Petitioners argue that section 16(a) is not narrowly drawn to further the Government's interest in protecting children from broadcast indecency for two reasons: First, they assert that the class to be protected should be limited to children under the age of 12; and second, they contend that the "safe harbor" is not narrowly tailored because it fails to take proper account of the First Amendment rights of adults and because of the chilling effect of the 6:00 a.m. to midnight ban on the programs aired during the evening "prime time" hours. We address these arguments in turn.

a. Definition of "children"

Petitioners concede that it is appropriate to protect young children from exposure to indecent broadcasts. They remind us, however, that in *ACT I* we found it "troubling [that] the FCC ventures no explanation why it takes teens aged 12-17 to be the relevant age group for channeling purposes" in light of the fact that in an earlier legislative proposal, "the Commission would have required broadcasters to minimize the risk of exposing to indecent material children *under age* 12," 852 F.2d at 1341-42 (emphasis in original), and that in *ACT II* we directed the Commission on remand to address the question of the appropriate definition of "children." 932 F.2d at 1510.

Although, in *ACT II*, we made no mention of the fact, in its *1990 Report*, the FCC defined "children" to include "children ages 17 and under." 5 F.C.C.R. at 5301. The agency offered three reasons in support of its definition: Other federal statutes designed to protect children from

indecent speech use the same standard (citing 47 U.S.C.A. § 223(b)(3) (Supp. II 1990) (forbidding indecent telephone communications to persons under 18)); most States have laws penalizing persons who disseminate sexually explicit materials to children ages 17 and under; and several Supreme Court decisions have sustained the constitutionality of statutes protecting children ages 17 and under (citing *Sable*, *Ginsberg*, and *Bethel School District.*). *Id.*

We find these reasons persuasive and note, as the Commission did in the *1993 Report and Order* promulgating regulations pursuant to section 16(a), that the sponsor of that section, Senator Byrd, made specific reference to the FCC's finding that "there is a reasonable risk that significant numbers of children ages 17 and under listen to radio and view television at all times of the day or night." 138 Cong.Rec. § 7308 (1992) (statement of Sen. Byrd). In light of Supreme Court precedent and the broad national consensus that children under the age of 18 need to be protected from exposure to sexually explicit materials, the Commission was fully justified in concluding that the Government interest extends to minors of all ages.

b. The midnight to 6:00 a.m. "safe harbor"

Although, for the reasons set forth in Part II. B. below, we will require the Commission to allow the broadcast of indecent material between 10:00 p.m. and 6:00 a.m., we will address the propriety of section 16(a)'s midnight to 6:00 a.m. safe harbor. We do so for two reasons: First, in addressing the "narrowly tailored" issue, the parties have focused their arguments on the evidence offered by the Commission in support of the section's 6:00 a.m. to midnight ban on indecent programming. Second, the principles we bring to bear in our analysis of the midnight to 6:00 a.m. safe harbor apply with equal force to the

more lenient one that the Commission must adopt as a result of today's opinion. Although fewer children will be protected by the expanded safe harbor, that fact will not affect its constitutionality. If the 6:00 a.m. to midnight ban on indecent programming is permissible to protect minors who listen to the radio or view television as late as midnight, the reduction of the ban by two hours will remain narrowly tailored to serve this more modest goal.

In *Pacifica*, the Supreme Court found that it was constitutionally permissible for the Government to place restrictions on the broadcast of indecent speech in order to protect the well-being of our youth. 438 U.S. at 749-51, 98 S.Ct. at 3040-41. We have since acknowledged that such restrictions may take the form of channeling provided "that the Commission . . . identify some reasonable period of time during which indecent material may be broadcast. . . ." *ACT II*, 932 F.2d at 1509. The question, then, is what period will serve the compelling governmental interests without unduly infringing on the adult population's right to see and hear indecent material. We now review the Government's attempt to strike that balance.

The Supreme Court has stated that "a government body seeking to sustain a restriction on . . . speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, —— U.S. ——, ——, 113 S.Ct. 1792, 1800, 123 L.Ed.2d 543 (1993); *see also Turner Broadcasting System, Inc. v. FCC*, —— U.S. ——, ——, 114 S.Ct. 2445, 2470, 129 L.Ed.2d 497 (1994) (same). The data on broadcasting that the FCC has collected reveal that large numbers of children view television or listen to the radio from the early morning until late in the evening, that those numbers decline rapidly as midnight approaches, and that a substantial portion of the adult audience is tuned into television or radio broadcasts af-

ter midnight. We find this information sufficient to support the safe harbor parameters that Congress has drawn.

The data collected by the FCC and republished in the Congressional Record for June 1, 1992, indicate that while 4.3 million, or approximately 21 percent, of "teenagers" (defined as children ages 12 to 17) watch broadcast television between 11:00 and 11:30 p.m., the number drops to 3.1 million (15.2 percent) between 11:30 p.m. and 1:00 a.m. and to less than 1 million (4.8 percent) between 1:45 and 2:00 a.m. 138 Cong.Rec. S7321. Comparable national averages are not available for children under 12, but the figures for particular major cities are instructive. In New York, for example, 6 percent of those aged 2 to 11 watch television between 11:00 and 11:30 p.m. on weekdays while the figures for Washington, D.C., and Los Angeles are 6 percent and 3 percent, respectively. *Id.* at S7322.

Concerning the morning portion of the broadcast restriction, the FCC has produced studies which suggest that significant numbers of children aged 2 through 17 watch television in the early morning hours. In the case of Seattle, one of two medium-sized media markets surveyed, an average of 102,200 minors watched television between the hours of 6:00 a.m. and 8:00 a.m., Monday through Friday; in Salt Lake City, the average was 28,000 for the period from 6:00 a.m. to 10:00 a.m. *1993 Report and Order*, 8 F.C.C.R. at 708.

The statistical data on radio audiences also demonstrate that there is a reasonable risk that significant numbers of children would be exposed to indecedent radio programs if they were broadcast in the hours immediately before midnight. According to the FCC, there is an average quarter-hour radio audience of 2.4 million teenagers, or 12 percent, between 6:00 a.m. and midnight. *Id.* Just over half that number, 1.4 million teenagers, listen to the radio during the quarter hour between midnight and

12:15 a.m. on an average night. *1990 Report*, 5 F.C.C.R. at 5302.

It is apparent, then, that of the approximately 20.2 million teenagers and 36.3 million children under 12 in the United States, *see 1989 NOI*, 4 F.C.C.R. at 8366; n. 33; *Nielsen Television Index National TV Ratings February 24-March 1, 1992* 127, a significant percentage watch broadcast television or listen to radio from as early as 6:00 a.m. to as late as 11:30 p.m.; and in the case of teenagers, even later. We conclude that there is a reasonable risk that large numbers of children would be exposed to any indecent material broadcast between 6:00 a.m. and midnight.

Petitioners suggest that Congress should have used station-specific and program-specific data in assessing when children are at risk of being exposed to broadcast indecency. We question whether this would have aided the analysis. Children will not likely record, in a Nielsen diary or other survey, that they listen to or view programs of which their parents disapprove. Furthermore, changes in the program menu make yesterday's findings irrelevant today. Finally, to borrow the Commission's phrase, such station- and program-specific data do not take "children's grazing" into account. As the Supreme Court observed in *Pacifica*, "[b]ecause the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content." 438 U.S. at 748, 98 S.Ct. at 3040. (In *Pacifica*, the objectionable broadcast was heard by a child in a car that was being driven by his father.) For this reason, we agree with the Commission that such data would not be "instructive." *1993 Report and Order*, 8 F.C.C.R. at 711.

The remaining question, then, is whether Congress, in enacting section 16(a), and the Commission, in promulgating the regulations, have taken into account the First Amendment rights of the very large numbers of adults who wish to view or listen to indecent broadcasts. We

believe they have. The data indicate that significant numbers of adults view or listen to programs broadcast after midnight. Based on information provided by Nielsen indicating that television sets in 23 percent of American homes are in use at 1:00 a.m., the Commission calculated that between 21 and 53 million viewers were watching television at that time. *1989 NOI*, 4 F.C.C.R. at 8362; *see also id.* at 8381, 8393 (in Chicago, approximately 15 percent of adults watch broadcast television at midnight, and approximately 18 percent do so in Washington, D.C.). Comments submitted to the FCC by petitioners indicate that approximately 11.7 million adults listen to the radio between 10:00 p.m. and 11:00 p.m., while 7.4 million do so between midnight and 1:00 a.m. 1992 Comments at 8 n. 3 (reprinted in Joint Appendix at 348). With an estimated 181 million adult listeners, this would indicate that approximately 6 percent of adults listen to the radio between 10:00 p.m. and 11:00 p.m. while 4 percent of them do so between midnight and 1:00 a.m. *Id.*

While the numbers of adults watching television and listening to radio after midnight are admittedly small, they are not insignificant. Furthermore, as we have noted above, adults have alternative means of satisfying their interest in indecent material at other hours in ways that pose no risk to minors. We therefore believe that a midnight to 6:00 a.m. safe harbor takes adequate account of adults' First Amendment rights.

Petitioners argue, nevertheless, that delaying the safe harbor until midnight will have a chilling effect on the airing of programs during the evening "prime time" hours that are of special interest to adults. They cite, as examples, news and documentary programs and dramas that deal with such sensitive contemporary problems as sexual harassment and the AIDS epidemic and assert that a broadcaster might choose to refrain from presenting relevant material rather than risk the consequences of being

charged with airing broadcast indecency. Whatever chilling effects may be said to inhere in the regulation of indecent speech, these have existed ever since the Supreme Court first upheld the FCC's enforcement of section 1464 of the Radio Act. The enactment of section 16(a) does not add to such anxieties; to the contrary, the purpose of channeling, which we mandated in *ACT I* and reaffirmed in *ACT II*, 852 F.2d at 1343-44; 932 F.2d at 1509, and which Congress has now codified, is to provide a period in which radio and television stations may let down their hair without worrying whether they have stepped over any line other than that which separates protected speech from obscenity. Thus, section 16(a) has ameliorated rather than aggravated whatever chilling effect may be inherent in section 1464.

Petitioners also argue that section 16(a)'s midnight to 6:00 a.m. channeling provision is not narrowly tailored because, for example, Congress has failed to take into consideration the fact that it bans indecent broadcasts during school hours when children are presumably subject to strict adult supervision, thereby depriving adults from listening to such broadcasts during daytime hours when the risk of harm to minors is slight. The Government's concerns, of course, extend to children who are too young to attend school. *See Pacifica*, 438 U.S. at 749, 98 S.Ct. at 3040 ("broadcasting is uniquely accessible to children, even those too young to read"). But more to the point, even if such fine tuning were feasible, we do not believe that the First Amendment requires that degree of precision.

In this case, determining the parameters of a safe harbour involves a balancing of irreconcilable interests. It is, of course, the ultimate prerogative of the judiciary to determine whether an act of Congress is consistent with the Constitution. Nevertheless, we believe that deciding where along the bell curves of declining adult and child audiences it is most reasonable to permit indecent broadcasts is the kind of judgment that is better left to Congress, so

long as there is evidence to support the legislative judgment. Extending the safe harbor for broadcast indecency to an earlier hour involves "a difference only in degree, not a less restrictive alternative in kind." *Burson v. Freeman*, 504 U.S. 191, 210, 112 S.Ct. 1846, 1857, 119 L.Ed.2d 5 (1992) (reducing campaign-free boundary around entrances to polling places from 100 feet to 25 feet is a difference in degree, not a less restrictive alternative in kind); *see also Buckley v. Valeo*, 424 U.S. 1, 30, 96 S.Ct. 612, 640, 46 L.Ed.2d 659 (1976) (if some limit on campaign contributions is necessary, court has no scalpel to probe whether $2,000 ceiling might not serve as well as $1,000). It follows, then, that in a case of this kind, which involves restrictions in degree, there may be a range of safe harbors, each of which will satisfy the "narrowly tailored" requirement of the First Amendment. We are dealing with questions of judgment; and here, we defer to Congress's determination of where to draw the line just as the Supreme Court did when it accepted Congress's judgment that $1,000 rather than some other figure was the appropriate limit to place on campaign contributions.

Recognizing the Government's compelling interest in protecting children from indecent broadcasts, Congress channeled indecent broadcasts to the hours between midnight and 6:00 a.m. in the hope of minimizing children's exposure to such material. Given the substantially smaller number of children in the audience after midnight, we find that section 16(a) reduces children's exposure to broadcast indecency to a significant degree. We also find that this restriction does not unnecessarily interfere with the ability of adults to watch or listen to such materials both because substantial numbers of them are active after midnight and because adults have so many alternative ways of satisfying their tastes at other times. Although the restrictions burden the rights of many adults, it seems entirely appropriate that the marginal convenience of some adults be made to yield to the imperative needs of

the young. We thus conclude that, standing alone, the midnight to 6:00 a.m. safe harbor is narrowly tailored to serve the Government's compelling interest in the well-being of our youth.

B. The Public Broadcaster Exception

Section 16(a) permits public stations that sign off the air at or before midnight to broadcast indecent material after 10:00 p.m. *See* 47 U.S.C. § 303 note. Petitioners argue that section 16(a) is unconstitutional because it allows the stations to present indecent material two hours earlier than all others.

Congress has provided no explanation for the special treatment accorded these stations other than the following: "In order to accommodate public television and radio stations that go off the air at or before 12 midnight, the FCC's enforcement authority would extend [to] the hour of 10 o'clock p.m. for those stations." 138 Cong.Rec. S7308 (statement of Sen. Bryd). The Commission has done little better. In its *1993 Report and Order*, the agency explained the preference as follows:

> In balancing the interests at stake, it appears reasonable to afford public broadcasters that do not operate during the regular safe harbor time period at least some opportunity to air indecent material as opposed to forcing them to extend their broadcast day beyond that which is economically feasible. Congress carved out this exception apparently as a kind of "rough accommodation" of its concerns for public broadcasters.

8 F.C.C.R. at 710. In its brief, the Commission justifies the disparate treatment accorded public and commercial broadcasters who sign off the air at midnight by suggesting that the latter may be able to finance the extension of their broadcasting day through the sale of advertising time. The agency also argues that allowing these public stations to begin broadcasting indecent material at 10:00

p.m. despite the significantly larger number of children in the radio and television audiences represents a reasonable trade-off because it serves the "substantial" (as opposed to "compelling") governmental interest in accommodating the free speech rights of those stations. The Commission does not address the phenomenon of "children's grazing" that it used so effectively in arguing against the relevance of program-specific statistics.

Because Congress has made no suggestion that minors are less likely to be corrupted by sexually explicit material that is broadcast by a public as opposed to a commercial station, and because section 16(a) was adopted in reluctant response to our rejection of the earlier statute imposing a total ban on indecent broadcasts, we can only conclude that Congress created the exception as a result of a misunderstanding of our directive in *ACT II*. Our instruction that the Commission must "afford broadcasters clear notice of reasonably determined times at which indecent material safely may be aired," 932 F.2d at 1509 (internal quotation marks omitted), did not require that every station be given some opportunity to broadcast indecent material. Rather, it was our expressed view that a clearly articulated channeling rule, as opposed to a case-by-case apporach, was necessary to enable broadcasters to know when they might safely air indecent material. As the Supreme Court has observed, in this unique medium, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390, 89 S.Ct. 1794, 1806, 23 L.Ed.2d 371 (1969).

Whatever Congress's reasons for creating it, the preferential safe harbor has the effect of undermining both the argument for prohibiting the broadcasting of indecent speech before that hour and the constitutional viability of the more restrictive safe habor that appears to have been Congress's principal objective in enacting section 16(a). In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S.

221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987), the Supreme Court addressed a state sales tax that provided a tax exemption for religious, professional, trade, and sports journals, but not other magazines. The Court invalidated the selective application of the sales tax, in part because the articulated interest of encouraging "fledgling" publishers did not apply to struggling magazines other than those specified. *Id.* at 232, 107 S.Ct. at 1729. The Court found that even assuming there was a compelling interest in protecting such publishers, a selective exemption is not narrowly tailored to achieve that end. *Id.; accord Minneapolis Star & Tribune Co. v. Minnesota Commissoner of Revenue*, 460 U.S. 575, 591-92, 103 S.Ct. 1365, 1375-76; 75 L.Ed.2d 295 (1983) (state tax that exempted first $100,000 worth of ink and paper from state use tax unconstitutionally discriminated against small group of larger newspapers in violation of First Amendment).

Similarly, in *City of Cincinnati v. Discovery Network, Inc.*, —— U.S. ——, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993), a municipal ordinance imposed a ban on newsracks dispensing commercial publications because they were unsightly but did not impose this ban on newsracks dispensing newspapers. The Court struck down the regulation, finding that the distinction between commercial and noncommercial newsracks bore "no relationship *whatsoever* to the particular interests that the city has asserted. It [was] therefore an impermissible means of responding to the city's admittedly legitimate interests." *Id.* at ——, 113 S.Ct. at 1514 (emphasis in original).

Congress has failed to explain what, if any, relationship the disparate treatment accorded certain public stations bears to the compelling Government interest—or to any other legislative value—that Congress sought to advance when it enacted section 16(a). This is not a case like *Alliance for Community Media*, 56 F.3d at 127-28, in which we allowed the FCC to require the segregation and

blocking of indecent programs on leased-access channels while not imposing a similar restriction on public access channels. There, the Commission was able to justify the disprate treatment by carefully documenting the relationship between the regulation at issue and the problem to be solved, namely, the uninvited intrusion of indecent material into leased-access channel programming. Here, Congress and the Commission have backed away from the consequences of their own reasoning, leaving us with no choice but to hold that the section is unconstitutional insofar as it bars the broadcasting of indecent speech between the hours of 10:00 p.m. and midnight.

C. Our Decisions in *ACT I* and *ACT II*

Petitioners maintain that our holdings in *ACT I* and *ACT II* preclude our findings that section 16(a) is narrowly tailored to achieve the Government's compelling interest as defined by them. While we have addressed their principal arguments above—and have done so in a manner that we believe to be consistent with our holdings in those two cases—we point to certain essential differences between this case and those with which we dealt in *ACT I* and *ACT II*.

ACT I involved an asessment of the constitutionality of channeling decisions that had been made by the FCC on its own initiative; here we are dealing with an act of Congress which, as the Supreme Court has pointed out, enjoys a "presumption of constitutionality" that is not to be equated with "the presumption of regularity afforded an agency in fulfilling its statutory mandate." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 n.9, 103 S.Ct. 2856, 2866 n. 9, 77 L.Ed.2d 443 (1983). It is true, of course, that in *ACT II* we vacated a total ban on indecent broadcasts that Congress had attached to an appropriations bill. In doing so, we stated that our holding in *ACT I*

> necessarily means that the Commission may not ban such broadcasts entirely. The fact that Congress itself mandated the total ban on broadcast indecency does not alter our view that, under *ACT I*, such a prohibition cannot withstand constitutional scrutiny.

932 F.2d at 1509. Having declared Congress's 24-hour ban unconstitutional because of its totality, we remanded the case to the Commission with instructions to redetermine,

> after a full and fair hearing, the times at which indecent material may be broadcast, to carefully review and address the specific concerns we raised in *ACT I:* among them, the appropriate definitions of "children" and "reasonable risk" for channeling purposes, the paucity of station- or program-specific audience data expressed as a percentage of the relevant age group population, and the scope of the government's interest in regulating indecent broadcasts.

Id. at 1510 (internal quotation marks and ellipsis omitted). In doing so, we made no mention of the fact that subsequent to our decision in *ACT I*, the Commission had accumulated substantial information and comments relating to the banning of indecent broadcasts and had stated its reasons for defining "children" to include those aged 12 to 17. *ACT II*, therefore, cannot be seen as a rejection of the sufficiency of either.

While our holdings in this case are generally consistent with those in our two earlier decisions, we acknowledge that there are significant differences in our approach to certain of the issues. To the degree that the analyses in those earlier cases disagree with that contained in today's decision, they are, of course, superseded.

III. Conclusion

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 2545, 105 L.Ed.2d 342 (1989). The Constitution, however, permits restrictions on speech where necessary in order to serve a compelling public interest, provided that they are narrowly tailored. We hold that section 16(a) serves such an interest. But because Congress imposed different restrictions on each of two categories of broadcasters while failing to explain how this disparate treatment advanced its goal of protecting young minds from the corrupting influences of indecent speech, we must set aside the more restrictive one. Accordingly, we remand this case to the Federal Communications Commission with instructions to limit its ban on the broadcasting of indecent programs to the period from 6:00 a.m. to 10:00 p.m.

It is so ordered.

HARRY T. EDWARDS, Chief Judge, dissenting:

In this case, the majority upholds as constitutional a *total ban* of "indecent" speech on *broadcast* television and radio between the hours of 6 a.m. and midnight.[1] The

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[1] At issue is the Public Telecommunications Act of 1992, Pub.L. No. 102-356, § 16(a), 106 Stat. 949, 954 (1992) ("section 16(a)"). Section 16(a) of Act provides:

> FCC Regulations—The Federal Communications Commission shall promulgate rgeulations to prohibit the broadcasting of indecent programming—
>
> (1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and
>
> (2) between 6 a.m. and 12 midnight on any day for any radio or television broadcasting station not described in paragraph (1).
>
> The regulations required under this subsection shall be promulgated in accordance with section 553 of title 5, United States Code, and shall become final not later than 180 days after the date of enactment of this Act [Aug. 26, 1992].

47 U.S.C. § 303 note (Supp. IV 1992).

Section 16(a) was enforced by the Federal Communications Commission in 1993. *In the Matter of Enforcement Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464: Report and Order*, 8 F.C.C.R. 704, 711 (1993) (*"Enforcement Order"*).

Although the majority finds the 6 a.m. to midnight ban is narrowly tailored to serve a compelling state interest, it holds that section 16(a) is unconstitutional insofar as it bars the broadcasting of indecent speech between the hours of 10 p.m. and midnight. The majority reaches this conclusion because "Congress has failed to explain what, if any, relationship the disparate treatment accorded certain public stations bears to the compelling Government interest—or to any legislative value—that Congress sought to advance when it enacted section 16(a)."

The "public broadcaster exception" is an aside to the real issue in this case. Indeed, in holding that the 6 a.m. to midnight ban is constitutional, the majority appears to invite Congress to extend the 6 a.m. to midnight ban to all broadcasters, without exception. Therefore, in my view, the majority's treatment of this issue in no way deflects from its principal holding that "the midnight to

majority readily acknowledges that *indecent* speech (as distinguished from *obscene* speech) is fully protected by the Constitution, and that the Government may not regulate such speech based on its content except when it chooses the least restrictive means to effectively promote an articulated compelling interest. In this case, the Government fails to satisfy the acknowledged constitutional strictures.

The Government advances three goals in support of the statute: first, it claims that the statute facilitates parental supervision of the programming their children watch and hear; second, it claims that the ban promotes the well-being of minors by protecting them from indecent programming assumed to be harmful; and, finally, it contends that the ban preserves the privacy of the home. *Enforcement Order*, 8 F.C.C.R. at 705-06. The majority finds the first two interests compelling, and so finds it unnecessary to address the third. I, too, will focus on the first two interests, which I find to be unsupported.

As an initial matter, I do not comprehend how the two interests can stand *together*. "Congress may properly pass a law to facilitate *parental supervision of their children, i.e.*, a law that simply segregates and blocks indecent programming and thereby helps parents control whether and to what extent their children are exposed to such programming. However, a law that effectively *bans* all indecent programming—as does the statute at issue in this case—does not facilitate parental supervision. In my view, my right as a parent has been preempted, not facilitated, if I am told that certain programming will be banned from my . . . television. Congress cannot take away my right to decide what my children watch, absent some showing that my children are in fact at risk of harm from

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6:00 a.m. safe harbor is narrowly tailored to serve the Government's compelling interest in the well-being of our youth." It is this holding that will be the focus of this dissent.

exposure to indecent programming." *Alliance for Community Media v. FCC*, 56 F.3d 105, 145 (D.C.Cir. 1995) (Edwards, C.J., dissenting).

Furthermore, the two interests—facilitating parental supervision and protecting children from indecent material—fare no better if considered alone. With respect to the alleged interest in protecting children, although the majority strains mightily to rest its finding of harm on intuitive notions of morality and decency (notions with which I have great sympathy), the simple truth is that "[t]here is not one iota of evidence in the record . . . to support the claim that exposure to indecency is harmful—indeed, the nature of the alleged 'harm' is never explained." *Id.* There *is* significant evidence suggesting a causal connection between viewing *violence* on television and antisocial violent behavior;[2] but, as was conceded by Government counsel at oral argument in this case, the FCC has pointed to no such evidence addressing the effects of *indecent* programming. With respect to the interest in facilitating parental supervision, the statute is not tailored to aid parents' control over what their children watch and hear; it does not, for example, "segregate" indecent programming on special channels, as was the case in *Alliance for Community Media*,[3] nor does it pro-

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[2] *See, e.g.*, ALBERT BANDURA, AGGRESSION: A SOCIAL LEARNING ANALYSIS 72-76 (1973); WILLIAM A. BELSON, TELEVISION VIOLENCE AND THE ADOLESCENT BOY (1978); GEORGE COMSTOCK, THE EVOLUTION OF AMERICAN TELEVISION 159-238 (1989); MONROE M. LEFKOWITZ ET AL., GROWING UP TO BE VIOLENT: A LONGITUDINAL STUDY OF THE DEVELOPMENT OF AGGRESSION (1977); L. Rowell Huesmann et al., *The Effects of Television Violence on Aggression: A Reply to a Skeptic*, *in* PSYCHOLOGY AND SOCIAL POLICY 191 (Peter Suedfeld & Philip E. Tetlock eds., 1992); David Pearl, *Familial, Peer, and Television Influence on Aggressive and Violent Behavior*, *in* CHILDHOOD AGGRESSION AND VIOLENCE: SOURCES OF INFLUENCE, PREVENTION, AND CONTROL 231, 236-37 (David H. Crowell et al. eds., 1987).

[3] *Alliance for Community Media* involved the Cable Television Consumer Protection and Competition Act of 1992, Pub.L. No. 102-

mote a blocking device which individuals control. Rather, section 16(a) involves a *total ban* of disfavored programming during hours when adult viewers are most likely to be in the audience.

Because the statutory ban imposed by section 16(a) is not the least restrictive means to further compelling state interests, the majority decision must rest primarily on a perceived distinction between the First Amendment rights of *broadcast media* and *cable (and all other non-broadcast) media*. The majority appears to recognize that section 16(a) could not withstand constitutional scrutiny if applied against *cable* television operators; nonetheless, the majority finds this irrelevant because it believes that "there can be no doubt that the traditional broadcast media are properly subject to more regulation than is generally permissible under the First Amendment." This is the heart of the case, plain and simple.

Respectfully, I find the majority's position flawed. First, because I believe it is no longer responsible for courts to provide lesser First Amendment protection to broadcasting based on its alleged "unique attributes," I would scrutinze section 16(a) in the same manner that courts scrutinize speech restrictions of cable media.

Second, I find it incomprehensible that the majority can so easily reject the "public broadcaster exception" to section 16(a), *see* note 1 *supra*, and yet be blind to the utterly irrational distinction that Congress has created between *broadcast* and *cable* operators. No one disputes that cable exhibits more and worse indecency than does broadcast. And cable television is certainly pervasive in our country. Today, a majority of television households

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385, § 10, 106 Stat. 1460, 1468 (1992) and *In the Matter of Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 8 F.C.C.R. 2638 (1993), which included a segregate-and-block scheme.

have cable,[4] and over the last two decades, the percentage of television households with cable has increased every year.[5] However, the Government does not even attempt to regulate cable with the same heavy regulatory hand it applies to the broadcast media. There is no ban between 6 a.m. and midnight imposed on cable. Rather, the Government relies on viewer subscription and individual discretion instead of regulation comercial cable. Viewers may receive commercial cable, with all of its indecent material, to be seen by adults and children at any time, subject only to the viewing discretion of the cable subscriber. "Furthermore, many subscribers purchase cable service to get improved [broadcast] television reception, and a number of basic cable subscriptions are packaged to included channels that offer some indecent programming; so these subscribers will get indecent programming whether they want it or not." *Id.*, 56 F.3d at 149 (Edwards, C.J., dissenting). In other words, the Government assumes that this scheme, which relies on personal subscription and individual discretion, fosters parental choice and protects children without unduly infringing on the free speech rights of cable operators and the adult audience.

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[4] Approximately 59 million households have cable television. RESEARCH & POLICY ANALYSIS DEPARTMENT, NATIONAL CABLE TELEVISION ASSOCIATION, CABLE TELEVISION DEVELOPMENTS: INDUSTRY OVERVIEW, Fall 1994, at 1-A (citing A.C. Nielsen Co. & Paul Kagan Associates, Inc., *Marketing New Media*, June 20, 1994); *see also Alliance for Community Media*, 56 F.3d at 124-25 (citing H.R.CONF.REP. No. 862, 102d Cong., 2d Sess. 56 (1992) (noting that more than sixty percent of all households with television, subscribe to cable)); *id.* (citing S.REP. No. 92, 102d Cong., 2d Sess. 3 (1991) U.S.Code Cong. & Admin.News 1992, pp. 1133, 1135, 1238 (noting that "[c]able television has become our Nation's dominant video distribution medium")).

[5] In 1975, the percentage of television households with cable was 13%; in 1985, the percentage was 45%; and in 1994, estimation suggest between 62% and 63% of television households have cable. NATIONAL CABLE TELEVISION ASSOCIATION, at 1-A, 2-A.

If exposure to "indecency" really is harmful to children, then one wonders how to explain congressional schemes that impose iron-clad bans of indecency on *broadcasters*, while simultaneously allowing a virtual free hand for the real culprits—*cable operators*. And the greatest irony of all is that the majority holds that section 16(a) is constitutional in part because, in allowing parents to subscribe to cable television as they see fit, Congress has facilitated parental supervision of children. In other words, Congress may ban indecency on broadcast television because parents can easily purchase all the smut they please on cable! I find this rationale perplexing.

At bottom, I dissent for three reasons: First, the Government's asserted interests in facilitating parental supervision and protecting children from indecency are irreconcilably in conflict in this case. Second, the Commission offers no evidence that indecent broadcasting harms children. And although it is an easy assumpion to make—that indecent broadcasting is harmful to minors—Supreme Court doctrine suggests that the Government must provide some evidence of harm before enacting speech-restrictive regulations. Finally, the Government has made no attempt to search out the least speech-restrictive means to promote the interests that have been asserted. For these reasons, section 16(a) should be struck down as unconstitutional.

I. First Amendment Protections for the Broadcast Media

Over the years, Congress and the Commission have regulated the broadcast media more heavily than they have regulated the non-broadcast media. And courts have upheld speech-restrictive regulations imposed on broadcast which undoubtedly would have been struck down were they imposed on other media. *See, e.g., Turner Broadcasting Sys., Inc. v. FCC*, —— U.S. ——, ——, 114 S.Ct. 2445, 2456, 129 L.Ed.2d 497 (1994) (*"TBS"*)

("It is true that our cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media.")[6]; *FCC v. League of Women Voters of California*, 468 U.S. 364, 376, 104 S.Ct. 3106, 3115, 82 L.Ed.2d 278 (1984) ("Were a similar ban . . . applied to newspapers and magazines, we would not hesitate to strike it down as violative of the First Amendment"). The Supreme Court has explained its tendency to uphold speech-restrictive regulations of broadcast as providing the broadcast media with limited First Amendment protection. *See, e.g., FCC v. Pacifica Found.*, 438 U.S. 726, 748, 98 S.Ct. 3026, 3040, 57 L.Ed.2d 1073 (1978) (plurality opinion) ("[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection.").

The absurdity of this bifurcated approach—applying a relaxed level of scrutiny to content-based regulations of broadcast and a strict level of scrutiny for content-based regulations of non-broadcast media—is most apparent in a comparison of the Supreme Court's analysis of broadcast and cable. In *Pacifica*, a plurality of the Court applied a reduced level of scrutiny in determining the First Amendment rights of a broadcasting station. 438 U.S. at 748-50, 98 S.Ct. at 3039-41. Last year, however, a majority of the Court held that cable television is entitled to the same First Amendment protection as all other non-broadcast media. *TBS*, —— U.S. at ——, 114 S.Ct . at 2456-57, There is no justification for this apparent dichotomy in First Amendment jurisprudence. Whatever

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[6] "Compare *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969) (television), and *National Broadcasting Co. v. United States*, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943) (radio), with *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974) (print), and *Riley v. National Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988) (personal solicitation)." *TBS*, —— U.S. at ——, 114 S.Ct. at 2456 (parallel citaitons omitted).

the merits of *Pacifica* when it was issued almost 20 years ago, it makes no sense now.[7]

The justification for the Supreme Court's distinct First Amendment approach to broadcast originally centered on the notion of spectrum scarcity. The electromagnetic spectrum was physically limited—there were more would-be broadcasters than frequencies available and broadcasters wishing to broadcast on the same frequency may have interfered with each other—and required regulation to assign frequencies to broadcasters. *See TBS*, —— U.S.

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[7] In beginning their analysis of content-based regulations of broadcast, Court opinions often cite to the now-familiar quotation from *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503, 72 S.Ct. 777, 781, 96 L.Ed. 1098 (1952): "Each method [of expression] tends to present its own peculiar problems." *See, e.g. Pacifica*, 438 U.S. at 748, 98 S.Ct. at 3039-40; *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 386-87, 89 S.Ct. 1794, 1804-05, 23 L.Ed.2d 371 (1969); *League of Women Voters*, 468 U.S. at 377, 104 S.Ct. at 3106. In fact, these opinions seem to attribute more to the Court's statement in *Joseph Burstyn* than appears warranted. *Compare Joseph Burstyn*, 343 U.S. at 503, 72 S.Ct. at 781 ("Each method tends to present its own peculiar problems.") *with Pacifica*, 438 U.S. at 748, 98 S.Ct. at 3039 ("We have long recognized that each medium of expression presents special First Amendment problems." (citing *Joseph Burstyn*, 343 U.S. at 502-03, 72 S.Ct. at 780-81)) *and Red Lion*, 395 U.S. at 386-87, 89 S.Ct. at 1805 ("[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them." (citing *Joseph Burstyn*, 343 U.S. at 503, 72 S.Ct. at 781)).

More glaringly, these opinions fail to quote the sentence that follows. In *Joseph Burstyn*, the Supreme Court struck down a law which forbade the showing of any motion-picture film without a license, that could be withheld if a censor found the film sacrilegious. In determining that motion pictures were within the protection of the First Amendment, the Court stated: *"Each method tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary."* 343 U.S. at 503, 72 S.Ct. at 781 (emphasis added). Certainly with respect to broadcast and cable, the peculiar problems or differences between the two media do not justify different levels of First Amendment protection.

at ——, 114 S.Ct. at 2456. The Court reasoned that the Government could impose limited content restraints and certain affirmative obligations on broadcasters on account of spectrum scarcity. *See id.* at ——, 114 S.Ct. at 2457 (citing *Red Lion*, 395 U.S. at 390, 89 S.Ct. at 1806-07). In 1978, the Court provided two additional rationales—broadcast was uniquely intrusive into the privacy of the home and uniquely accessible to children—which justified relaxed scrutiny and thereby reduced the First Amendment protection accorded to broadcasters. *See Pacifica*, 438 U.S. at 748-49, 98 S.Ct. at 3039-40. These justifications—spectrum scarcity, intrusiveness, and accessibility to children—neither distinguish broadcast from cable, nor explain the relaxed application of the principles of the First Amendment to broadcast.

A. Spectrum Scarcity

In 1943, the Court determined that the "unique characteristic" of broadcast—that "[u]nlike other modes of expression, radio inherently is not available to all"—explained "why, unlike other modes of expression, it is subject to governmental regulation." *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 226, 63 S. Ct. 997, 1014, 87 L.Ed. 1344 (1943) ("*NBC*"). Twenty Ct. 997, 1014, 87 L.Ed. 1344 (1943) ("*NBC*"). Twenty-six years later, the Court spun out the First Amendment implications of this burgeoning scarcity theory. *Red Lion*, 395 U.S. at 388-90, 89 S.Ct. at 1805-07. The Court first offered an economic scarcity theory,[8] finding that "[w]here there are substantially more indi-

[8] Interestingly, in responding to Government's argument that cable and broadcast are alike in that they both are beset by "market dysfunction," the *TBS* Court stated that "the special physical characteristics of broadcast transmission, not the economic characteristics of the broadcast market, are what underlies our broadcast jurisprudence." —— U.S. at ——, 114 S.Ct. at 2457 (citations omitted). Apparently, the Court is now prepared to abandon the *economic* scarcity theory.

viduals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." [9] *Id.* at 388, 89 S.Ct. at 1806. The Court also offered a technological scarcity theory: recognizing the need to prevent "overcrowd[ing of] the spectrum," [10] *id.* at 389, 89 S.Ct. at 1806, the Court held that, "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium," [11] *id.* at 390 89 S.Ct. at 1806.

Although the Supreme Court has not declared the distinction between broadcast and other media a dead one, it has not lately given the distinction an enthusiastic endorsement. In fact, in recent years the Court has only

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[9] The scarcity theory justifying regulation of broadcast was hinged in part on a public trust notion: "those who are granted a license to broadcast must serve in a sense as fiduciaries for the public." *League of Women Voters*, 468 U.S. at 377, 104 S.Ct. at 3116.

[10] The Court recently restated this concern: "if two broadcasters were to attempt to transmit over the same frequency in the same locale, they would interfere with one another's signals, so that neither could be heard at all." *TBS*, —— U.S. at ——, 114 S.Ct. at 2456 (citing *NBC*, 319 U.S. at 212, 63 S.Ct. at 1007-08).

[11] *See also TBS*, —— U.S. at ——, 114 S.Ct. at 2457 (noting that spectrum scarcity "has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees" (citing *Red Lion*, 395 U.S. at 390, 89 S.Ct. at 1806-07)); *League of Women Voters*, 468 U.S. at 377, 104 S.Ct. at 3116 ("The fundamental distinguishing characteristics of the new medium of broadcasting that, in our view, has required some adjustment in First Amendment analysis is that '[b]roadcast frequencies are a scarce resource [that] must be portioned out among applicants.'" (quoting *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 101, 93 S.Ct. 2080, 2086, 36 L.Ed.2d 772 (1973))).

grudgingly upheld the distinction. *See, e.g., TBS,* —— U.S. at ——-——, 114 S.Ct. at 2456-57. On a few occasions, the Supreme Court has acknowledged the mounting criticism against its scarcity rationale. *See id.* at ——, 114 S.Ct. at 2457 (noting, that "courts and commentators have criticized the scarcity rationale since its inception");[12] *League of Women Voters,* 468 U.S. at 376-77 n. 11, 104 S.Ct. at 3115-16 n. 11.[13] Nevertheless, to date, the Court has declined to revisit the validity of the scarcity rationale. *See TBS,* —— U.S. at ——, 114 S.Ct. at 2457 ("[W]e have declined to question its continuing validity as support for our broadcast jurisprudence . . . and see no reason to do so here."); *League of Women Voters,* 468 U.S. at 377 n. 11, 104 S.Ct. at 3116 n. 11 ("We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have

[12] In *TBS,* —— U.S. at —— n. 5, 114 S.Ct. at 2457 n. 5, the Court cited some of those courts and commentators: *Telecommunications Research & Action Ctr. v. FCC,* 801 F.2d 501, 508-09 (D.C.Cir.1986), *cert. denied,* 482 U.S. 919, 107 S.Ct. 3196, 96 L.Ed.2d 684 (1987); LEE BOLLINGER, IMAGES OF A FREE PRESS 87-90 (1991); LUCAS POWE, AMERICAN BROADCASTING AND THE FIRST AMENDMENT 197-209 (1987); MATTHEW SPITZER, SEVEN DIRTY WORDS AND SIX OTHER STORIES 7-18 (1986); R.H. Coase, *The Federal Communications Commission,* 2 J.L. & ECON. 1, 12-27 (1959); Laurence H. Winer, *The Signal Cable Sends—Part I: Why Can't Cable Be More Like Broadcasting?,* 46 MD.L.REV. 212, 218-40 (1987); Note, *The Message in the Medium: The First Amendment on the Information Superhighway,* 107 HARV.L.REV. 1062, 1072-74 (1994).

[13] The *League of Women Voters* Court noted that "[t]he prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years," and that "[c]ritics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete." 468 U.S. at 376-77 n. 11, 104 S.Ct. at 3115-16 n. 11 (citing Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation,* 60 TEX.L.REV. 207, 221-26 (1982)).

advanced so far that some revision of the system of broadcast regulation may be required.").[14] In my view, it is no longer responsible for courts to apply a reduced level of First Amendment protection for regulations imposed on broadcast based on an indefensible notion of spectrum scarcity. It is time to revisit this rationale.

For years, scholars have argued that the scarcity of the broadcast spectrum is neither an accurate technological description of the spectrum, nor a "unique characteristic" that should make any difference in terms of First Amendment protection.[15] First, in response to the problem of broadcast interference when multiple broadcasters attempt to transmit on the same frequency, critics point out that this problem does not distinguish broadcasting for print [16] and is easily remedied with a system of administrative licensing or private property rights.[17] Another problem alluded to by the Court in *Red Lion* is the claim that the spectrum is inherently limited, in contrast to cable stations or newsprint. Today, however, the nation

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[14] In 1987, the Commission explicitly provided that "signal" to the Supreme Court in holding that, "the scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press. Therefore, in response to the question raised by the Supreme Court in *League of Women Voters*, we believe that the standard applied in *Red Lion* should be reconsidered and that the constitutional principles applicable to the printed press should be equally applicable to the electronic press." *In re Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, New York*, 2 F.C.C.R. 5043, 5053 (1987); *see also* Matthhew L. Spitzer, *The Constituitonality of Licensing Broadcasters*, 64 N.Y.U. L.Rev. 990, 1011 (1989).

[15] For a particularly thorough rejection of various scarcity arguments, see Spitzer, *supra*, at 1013-20, and notes 12-14 *supra*.

[16] *See* Spitzer, *supra*, at 1013-15.

[17] Coase demonstrated that one can efficiently distribute rights to scarce resources through a market system. *See* Coase, *supra*, at 12-27.

enjoys a proliferation of broadcast stations, [18] and should the country decide to increase the number of channels, it need only devote more resources toward the development of the electromagnetic spectrum.[19]

In response to the economic scarcity argument—that there are more would-be broadcasters than spectrum frequencies available—economists argue that all resources are scarce in the sense that people often would like to use more than exists.[20] Especially when the Government gives

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[18] This court has found that "[b]roadcast frequencies are much less scarce now than when the scarcity rationale first arose in *National Broadcasting Co.* . . . and it appears that currently 'the number of broadcast stations . . . rivals and perhaps surpasses the number of newspapers and magazines in which political messages may effectivley be carried.'" *Telecommunications Research & Action Ctr.*, 801 F.2d at 508-09 n. 4 (quoting *Loveday v. FCC*, 707 F.2d 1443, 1459 (D.C.Cir.), *cert. denied*, 464 U.S. 1008, 104 S.Ct. 525, 78 L.Ed.2d 709 (1983)). This court went on to note, "[i]ndeed, many markets have a far greater number of broadcasting stations than newspapers." *Id.*; *see also* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 54 (1993) (noting that most cities have far more television and radio stations than major newspapers).

[19] *See* Spitzer, *supra*, at 1015; *cf.* Fowler & Brenner, *supra*, at 222-23 (suggesting that additional channels can be added without increasing portion reserved for broadcast by decreasing bandwidth of each channel and claiming that advertising dollars restrict broadcast opportunities more than number of channels).

[20] Judge Bork's opinion *Telecommunications Research & Action Ctr.* sums up this point:

> It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers and other resources that go into the production and dissemination of print journalism. Not everyone who wishes to publish a newspaper, or even a pamphlet, may do so. Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a uni-

away a valuable commodity, such as the right to use certain airwaves free of charge, the demand will likely always exceed the supply.[21] And with the development of cable, spectrum-based communications media now have an abundance of alternatives, essentially rendering the economic scarcity argument superfluous.

In short, neither technological nor economic scarcity distinguish broadcast from other media. And while some may argue that spectrum scarcity may justify a system of administrative regulation as opposed to a free market approach to stations,[22] the theory does not justify reduced First Amendment protection.

B. Accessibility to Children and Pervasiveness

The two additional rationales offered by the plurality opinion in *Pacifica*, attempting to distinguish broadcasting from other media, also fail to justify limited First Amendment protection of broadcast. The plurality found that "broadcasting is uniquely accessible to children, even those too young to read." *Pacifica*, 438 U.S. at 749, 98 S.Ct. at 3040.[23] This characteristic, however, fails to dis-

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versal fact as a distinguishing principle necessarily leads to analytical confusion.

801 F.2d at 508 (footnotes omitted).

[21] Spitzer suggests that if one were to give paper away for free, the demand would certainly exceed the supply. *See* Spitzer, *supra*, at 1016.

[22] Coase presents a compelling argument for a free market system, in which we would treat broadcast rights as private property to avoid the chaos of the 1920s: after an initial allocation, ownership and use could be governed by the free market. *See* Coase, *supra*, at 12-27.

[23] In *Joseph Burstyn*, the Court faced a similar argument, "that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression." 343 U.S. at 502, 72 S.Ct. at 780. The Court responded that, "[e]ven if one were to accept this hypothesis, it does not follow that mo-

tinguish broadcast from cable; and, notably, the rationale is absent from the Court's *TBS* opinion.

The plurality in *Pacifica* added another rationale which really has two components. The opinion reasoned that "the broadcast media have established a uniquely pervasive presence in the lives of all Amercians. . . . [The] material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home." [24] *Id.* at 748, 98 S.Ct. at 3040. Again, the pervasiveness of its programming hardly distinguishes broadcast from cable. As noted above, cable is pervasive: a majority of television households have cable today, and this percentage has increased every year over the last two decades. *See* NATIONAL CABLE TELEVISION ASSOCIATION, *supra*, at 1-A, 2-A. The intrusiveness rationale, that the material confronts the citizen in the privacy of his or her home, likewise, does not distinguish broadcast from cable, nor account for the divergent First Amendment treatment of the two media. Finally, in light of *TBS*, in which the Court omitted any discussion of these rationales, the *Pacifica* rationales no longer can be seen to serve as justifications for reduced First Amendment protection afforded to broadcast.

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tion pictures should be disqualified from First Amendment protection. If there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here." *Id.*

[24] The plurality opinion added:

> Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.

Pacifica, 438 U.S. at 748-49, 98 S.Ct. at 3040. This elaboration on the intrusiveness rationale, of course, does not distinguish broadcast from cable.

It is relevant that *Pacifica* was a plurality opinion which provided a very limited holding. *See* 438 U.S. at 750, 98 S.Ct. at 3041 ("It is appropriate . . . to emphasize the narrowness of our holding. . . . The Commission's decision rested entirely on a nuisance rationale under which context is all-important."), The Court has subsequently emphasized that *Pacifica's* holding was "emphatically narrow," *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 127, 109 S.Ct. 2829, 2837, 106 L.Ed.2d 93 (1989), essentially confirming that *Pacifica* never was seen to be a seminal statement of constitutional law. But beyond the narrowness of the Court's decision, it seems clear now that *Pacifica is* a flawed decision, at least when one considers it in light of enlightened economic theory, technological advancements, and subsequent case law. The critical underpinnings of the decision are no longer present. Thus, there is no reason to uphold a distinction between broadcast and cable media pursuant to a bifurcated First Amendment analysis.[25]

II. Full First Amendment Protection of Broadcast

Because no reasonable basis can be found to distinguish broadcast from cable in terms of the First Amendment protection the two media should receive, I would review

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[25] Zechariah Chafee provides a historical view of the Court's wavering toleration of speech-restrictive regulations on different media:

> Newspapers, books, pamphlets, and large meetings were for many centuries the only means of public discussion, so that the need for their protection has long been generally realized. On the other hand, when additional methods for spreading facts and ideas were introduced or greatly improved by modern inventions, writers and judges had not got into the habit of being solicitous about guarding their freedom. And so we have tolerated censorship of the mails, the importation of foreign books, the stage, the motion picture, and the radio.

Zechariah Chafee, Free Speech in the United States 381 (1942).

section 16(a) and the *Enforcement Order* under the stricter level of scrutiny courts apply to content-based regulations of cable. This means "the most exacting scrutiny" should be applied "to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *TBS*, —— U.S. at ——, 114 S.Ct. at 2459.[26] In *Sable*, the Court indicated that the "exacting scrutiny" test has two prongs: the Government's interests must be "compelling," and the method of regulation chosen must be "the least restrictive means" to achieve those compelling interests. 492 U.S. at 126, 109 S.Ct. at 2836. That is the essence of the test, I think.

In this case, the majority views the broadcast media as disfavored in the application of First Amendment rights, relying principally on *Pacifica;* however, my colleagues nonetheless agree that section 16(a) reflects a content-based regulation that is subject to exacting scrutiny. Indeed, even the FCC viewed the case in this way. In my view, there is no way that section 16(a) can survive exacting scrutiny.

A. Content-Based Regulations

In explaining the reasons for applying heightened or exacting scrutiny, the Supreme Court recently stated:

> At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence.

TBS, —— U.S. at ——, 114 S.Ct. at 2458. This fundamental principle means that "the First Amendment . . . does not countenance governmental control over the con-

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[26] The Justices voted 8-1 on this issue, although a majority of the Court found that the regulations were content neutral and applied intermediate scrutiny on this basis. *See TBS*, —— U.S. at ——, 114 S.Ct. at 2469.

tent of messages expressed by private individuals." *Id.*[27] Because section 16(a) and the *Enforcement Order* ban indecent expression,[28] they constitute content-based regulations, which have traditionally raised the red flag of exacting scrutiny. As the Court stated in *Sable*, "[t]he Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." 492 U.S. at 126, 109 S.Ct. at 2836. At issue in this case is whether the Government's interests are indeed compelling and whether it has chosen the least restrictive means to further its asserted compelling interests.

To withstand constitutional scrutiny, the Government's regulations must serve its interests " 'without unnecessarily interfering with First Amendment freedoms.' " *Id.* at 126, 109 S.Ct. at 2836 (quoting *Schaumburg v. Citizens for a Better Environment*, 444 U.S. at 620, 637, 100 S.Ct. 826, 836, 63 L.Ed.2d 73 (1980)). The First Amendment rights at stake here are those of broadcasters and the adult broadcasting audience. The Supreme Court finds laws insufficiently tailored when they deny adults their free speech rights by allowing them to read, watch, or hear only what was acceptable for children. *See, e.g., Butler v. Michigan*, 352 U.S. 380, 383, 77 S.Ct. 524, 525-26, 1 L.Ed.2d 412 (1957); *Sable*, 492 U.S. at 127, 109 S.Ct. at 2837 (finding that "this case, like *Butler*,

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[27] An earlier Court phrased this notion as: "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972).

[28] Section 16(a) applies to "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Enforcement Order*, 8 F.C.C.R. at 705 n. 10.

presents [the Court] with 'legislation not reasonably restricted to the evil with which it is said to deal' ") (quoting *Butler*, 352 U.S. at 383, 77 S.Ct. at 526).

When First Amendment rights are at stake, appellate courts cannot defer to a legislative finding, but must make an independent inquiry to assess whether the record supports the Government's interests. *Sable*, 492 U.S. at 129, 109 S.Ct. at 2838; *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843, 98 S.Ct. 1535, 1543-44, 56 L.Ed.2d 1 (1978) (assessing legislative finding or "declaration" that clear and present danger existed). The Court has found this "particularly true where the Legislature has concluded that its product does not violate the First Amendment." *Sable*, 492 U.S. at 129, 109 S.Ct. at 2838.

B. Compelling Interests

The FCC claims that section 16(a) serves three compelling governmental interests. The ban is meant, first, to support parental supervision of children; second, to promote the well-being of minors; and third, to preserve the privacy of the home. *Enforcement Order*, 8 F.C.C.R. at 705-06. Only the first two interests are at issue.

With respect to the interest in facilitating parental supervision, the Supreme Court has stated that the law has "consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg v. New York*, 390 U.S. 629, 639, 88 S.Ct. 1274, 1280, 20 L.Ed.2d 195 (1968). It is entirely reasonable for "[t]he legislature [to] properly conclude that parents and others . . . who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." *Id.* Similarly, with respect to the Commission's second interest, protecting the well-being of its youth, the Court on nu-

The second factor contributing to the *Bantam Books* holding was that scheme's failure to provide the merchant with notice that its publications would be listed as objectionable. 372 U.S. at 71, 83 S.Ct. at 639. That same failure does not afflict the FCC forfeiture scheme. The FCC routinely sends the targeted broadcaster both an LOI and an NAL, and after its receipt of each the broadcaster has an opportunity to represent its position to the FCC. SOF ¶¶ 10-11. The broadcaster and its attorneys also frequently make supplemental written and oral presentations to the Commissioners and other FCC staff members in an effort to persuade the FCC not to issue a forfeiture order. SOF ¶ 11.

The third factor leading to the *Bantam Books* holding was the Rhode Island Commission's failure to explain its categorization of books as obscene or objectionable. 372 U.S. at 71, 83 S.Ct. at 639. This scheme does not share that failing either. Here, the D.C. Circuit already has upheld the FCC's definition of indecent broadcasting, *see supra* p. 6, against overbreadth and vagueness challenges. *ACT I*, 852 F.2d at 1335-40; *ACT II*, 932 F.2d at 1508. The same could not be said of Rhode Island's definition of obscenity. *Bantam Books*, 372 U.S. at 64, 83 S.Ct. at 636. Here, the FCC also must explain why the subject broadcast was indecent before issuing a forfeiture order. 47 U.S.C. § 503(b)(4). No such requirement existed in Rhode Island.

The final factor weighing in against the Rhode Island scheme was that scheme's success at complete suppression of the targeted publications. In *Bantam Books*, the Commission's actions resulted in the complete suppression of the targeted publications. *Bantam Books*, 372 U.S. at 63, 64, 67-68, 71, 83 S.Ct. at 635, 636, 637-638, 639. Unlike the Rhode Island scheme, the FCC's supposed system of informal censorship does not completely ban indecent broadcasts. By its own terms, this scheme allows the broadcast of indecent speech during particular times of the day. As already discussed, the FCC only bans the broadcast of indecent material outside of the "safe harbor" period. Licensees are free to broadcast indecent material at any time between 8:00 p.m. and 6:00 a.m. SOF ¶ 9. Before the FCC even begins investigating an indecency complaint, its staff first determines

whether the broadcast aired outside of that safe harbor. SOF ¶ 9. Any "chill" the plaintiff may feel from forfeiture scheme disappears with the daylight.

Infinity is free from the risk of forfeiture as long as it broadcasts its indecent material during the safe harbor of the evening and early morning hours. The merchants in Rhode Island had no similar respite. This court will not construe the FCC forfeiture scheme as a system of censorship when that system only operates for two-thirds of the broadcasting day.

These distinctions demonstrate that the schemes at issue in *Bantam Books* and this case are not the same.[14] The court cannot, based on *Bantam Books*, construe the FCC's forfeiture scheme as one of prior restraint and censorship. The FCC is enforcing a court-approved definition of indecency through a system that provides for notice and judicial review. This is not the prior review and censorship of broadcast material. This is the FCC's regulation of an industry that serves at the pleasure of the public interest. Plaintiff may feel a chill because of the FCC's forfeiture scheme, but that chill is temporal only and has not been unconstitutionally inflicted. Accordingly, the court grants the FCC's motion for summary judgment on Infinity's constitutional claim and denies Infinity's motion for summary judgment.[15]

III. CONCLUSION

For the reasons stated in this Memorandum Opinion, the court concludes that it has jurisdiction only over the constitutional claim asserted, that only Infinity Broadcasting Corporation has standing

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[14] The court recognizes that *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397 (D.C.Cir.1975) questioned whether the FCC forfeiture scheme could be unconstitutional under *Bantam Books*. 515 F.2d at 403. That question was raised in dicta however, and did not address the distinctions this court has drawn.

[15] Because the court concludes that the FCC forfeiture scheme does not constitute a system of prior restraint and censorship this court need not address plaintiffs' due process argument.

to bring that claim, that the constitutional claim is ripe only as to Infinity, and that the FCC's forfeiture scheme does not violate the First Amendment. An appropriate Order shall issue this date.

ORDER AND JUDGMENT

This case comes before the court on plaintiffs' motion for a preliminary injunction, and plaintiffs' and defendant's cross-motions for summary judgment. For the reasons stated in the accompanying Memorandum Opinion issued this date it is hereby ORDERED that:

1. The court GRANTS the FCC's motion to dismiss count III of plaintiffs' Complaint for lack of subject matter jurisdiction.

2. The court GRANTS the FCC's motion to dismiss the following plaintiffs for lack of standing: Action for Children's Television; the American Civil Liberties Union; the Association of Independent Television Stations, Inc.; EZ Communications, Inc.; Fox Broadcasting Company, Inc.; Fox Television Stations, Inc.; the Motion Picture Association of America, Inc.; the National Association of Broadcasters; the National Association of College Broadcasters; National Public Radio; People for the American Way; Post- Newsweek Stations, Inc.; the Public Broadcasting Service; the Radio- Television News Directors Association; Shamrock Broadcasting, Inc.; the Society of Professional Journalists; 20 South Fork Broadcasting Corporation; and 20th Century Fox Film Corporation.

3. The court GRANTS the FCC's motion to dismiss plaintiff Greater Media, Inc. because Greater Media's claim is not yet ripe.

4. The court GRANTS the FCC's motion to dismiss plaintiff Evergreen Media Corporation based on considerations of comity.

5. The court DENIES the FCC's motion to dismiss plaintiff Infinity Broadcasting Corporation's constitutional claim arising from the 1990 Notice of Apparent Liability.

6. The court GRANTS the FCC's motion for summary judgment on counts I and II of plaintiff's complaint and ENTERS summary judgment for the FCC on those counts, which are hereby DISMISSED WITH PREJUDICE.

7. The court DENIES plaintiffs' motion for summary judgment in its entirety and DENIES plaintiffs' motion for a preliminary injunction as moot. This case now stands DISMISSED.

SO ORDERED.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

47 U.S.C. § 503. Forfeitures

* * * *

(b) Activities constituting violations authorizing imposition of forfeiture penalty; amount of penalty; procedures applicable; persons subject to penalty; liability exemption period

(1) Any person who is determined by the Commission in accordance with paragraph (3) or (4) of this subsection, to have—

(A) willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission;

(B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order

issued by the Commission under this chapter or under any treaty, convention, or other agreement to which the United States is a party and which is binding upon the United States;

(C) violated any provision of section 317(c) or 509(a) of this title; or

(D) violated any provision of section 1304, 1343, or 1464 of Title 18;

shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this subsection shall be in addition to any other penalty provided for by this chapter; except that this subsection shall not apply to any conduct which is subject to forfeiture under subchapter II of this chapter, part II or III of subchapter III of this chapter, or section 507 of this title.

(2)(A) If the violator is (i) a broadcast station licensee or permittee, (ii) a cable television operator, or (iii) an applicant for any broadcast or cable television operator license, permit, certificate, or other instrument or authorization issued by the Commission, the amount of any forfeiture penalty determined under this section shall not exceed $25,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $250,000 for any single act or failure to act described in paragraph (1) of this subsection.

(B) If the violator is a common carrier subject to the provisions of this chapter or an applicant for any common carrier license, permit, certificate, or other instrument of authorization issued by the Commission, the amount of any forfeiture penalty determined under this subsection shall not exceed $100,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $1,000,000 for any single act or failure to act described in paragraph (1) of this subsection.

(C) In any case not covered in subparagraph (A) or (B), the amount of any forfeiture penalty determined under this subsection shall not exceed $10,000 for each violation or each day of a

continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $75,000 for any single act or failure to act described in paragraph (1) of this subsection.

(D) The amount of such forfeiture penalty shall be assessed by the Commission, or its designee, by written notice. In determining the amount of such a forfeiture penalty, the Commission or its designee shall take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.

(3)(A) At the discretion of the Commission, a forfeiture penalty may be determined against a person under this subsection after notice and an opportunity for a hearing before the Commission or an administrative law judge thereof in accordance with section 554 of Title 5. Any person against whom a forfeiture penalty is determined under this paragraph may obtain review thereof pursuant to section 402(a) of this title.

(B) If any person fails to pay an assessment of a forfeiture penalty determined under subparagraph (A) of this paragraph, after it has become a final and unappealable order or after the appropriate court has entered final judgment in favor of the Commission, the Commission shall refer the matter to the Attorney General of the United States, who shall recover the amount assessed in any appropriate district court of the United States. In such action, the validity and appropriateness of the final order imposing the forfeiture penalty shall not be subject to review.

(4) Except as provided in paragraph (3) of this subsection, no forfeiture penalty shall be imposed under this subsection against any person unless and until—

(A) the Commission issues a notice of apparent liability, in writing, with respect to such person;

(B) such notice has been received by such person, or until the Commission has sent such notice to the last known address of such person, by registered or certified mail; and

(C) such person is granted an opportunity to show, in writing, within such reasonable period of time as the Commission prescribes by rule or regulation, who no such forfeiture penalty should be imposed.

Such a notice shall (i) identify each specific provision, term, and condition of any Act, rule, regulation, order, treaty, convention, or other agreement, license, permit, certificate, instrument, or authorization which such person apparently violated or with which such person apparently failed to comply; (ii) set forth the nature of the act or omission charged against such person and the facts upon which such charge is based; and (iii) state the date on which such conduct occurred. Any forfeiture penalty determined under this paragraph shall be recoverable pursuant to section 504(a) of this title.

(5) No forfeiture liability shall be determined under this subsection against any person, if such person does not hold a license, permit, certificate, or other authorization issued by the Commission, and if such person is not an applicant for a license, permit, certificate, or other authorization issued by the Commission unless, prior to the notice required by paragraph (3) of this subsection or the notice of apparent liability required by paragraph (4) of this subsection, such person (A) is sent a citation of the violation charged; (B) is given a reasonable opportunity for a personal interview with an official of the Commission, at the filed office of the Commission which is nearest to such person's place of residence; and (C) subsequently engages in conduct of the type described in such citation. The provisions of this paragraph shall not apply, however, if the person involved is engaging in activities for which a license, permit, certificate, or other authorization is required, or is a cable television system operator, if the person involved is transmitting on frequencies assigned for use in a service in which individual station operation is authorized by rule pursuant to section 307(e) of this title, or in

the case of violations of section 303(q) of this title, if the person involved is a nonlicensee tower owner who has previously received notice of the obligations imposed by section 303(q) of this title from the Commission or the permittee or licensee who uses that tower. Whenever the requirements of this paragraph are satisfied with respect to a particular person, such person shall not be entitled to receive any additional citation of the violation charged, with respect to any conduct of the type described in the citation sent under this paragraph.

(6) No forfeiture penalty shall be determined or imposed against any person under this subsection if—

(A) such person holds a broadcast station license issued under subchapter III of this chapter and if the violation charged occurred—

(i) more than 1 year prior to the date of issuance of the required notice or notice of apparent liability; or

(ii) prior to the date of commencement of the current term of such license,

whichever is earlier; or

(B) such person does not hold a broadcast station license issued under subchapter III of this chapter and if the violation charged occurred more than 1 year prior to the date of issuance of the required notice or notice of apparent liability.

For purposes of this paragraph, "date of commencement of the current term of such license" means the date of commencement of the last term of license for which the licensee has been granted a license by the Commission. A separate license term shall not be deemed to have commenced as a result of continuing a license in effect under section 307(c) of this title pending decision on an application for renewal of the license.

47 U.S.C. § 504. Forfeitures

(a) Recovery

The forfeitures provided for in this chapter shall be payable into the Treasury of the United States, and shall be recoverable, except as otherwise provided with respect to a forfeiture penalty determined under section 503(b)(3) of this title, in a civil suit in the name of the United States brought in the district where the person or carrier has its principal operating office or in any district through which the line or system of the carrier runs: *Provided*, That any suit for the recovery of a forfeiture imposed pursuant to the provisions of this chapter shall be a trial de novo: *Provided further*, That in the case of forfeiture by a ship, said forfeiture may also be recoverable by way of libel in any district in which such ship shall arrive or depart. Such forfeitures shall be in addition to any other general or specific penalties provided in this chapter. It shall be the duty of the various United States attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures under this chapter. The costs and expenses of such prosecutions shall be paid from the appropriation for the expenses of the courts of the United States.

No. 95-620

In the Supreme Court of the United States

OCTOBER TERM, 1995

ACTION FOR CHILDREN'S TELEVISION, ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the statutes governing the enforcement of the federal limitations on the broadcast of indecent programming are unconstitutional, either on their face or as generally applied by the Federal Communications Commission.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 59 F.3d 1249. The opinion of the district court (Pet. App. 31a-62a) is reported at 827 F. Supp. 4.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1995. The petition for a writ of certiorari was filed on October 16, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a constitutional challenge to the procedures by which the Federal Communications Commission (FCC or Commission) enforces the limitations governing the broadcast of indecent programming.

1. Section 503(b) of the Communications Act of 1934, 47 U.S.C. 503(b) (1988 & Supp. V 1993), authorizes the FCC to impose a monetary forfeiture for violations of various statutory provisions, including 18 U.S.C. 1464, which generally prohibits the broadcast of "obscene, indecent, or profane language." 47 U.S.C. 503(b)(1)(D) (Supp. V 1993). See generally *FCC* v. *Pacifica Found.*, 438 U.S. 726 (1978).[1]

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[1] The substantive contours of the government's power to regulate indecent broadcast programming, which are not at issue in this case (Pet. App. 3a), have been the subject of a lengthy separate litigation. See *Action for Children's Television* v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (remanding FCC's decision to restrict indecent programming to hours after midnight); *Action for Children's Television* v. *FCC*, 932 F.2d 1504 (D.C. Cir. 1991), cert. denied, 503 U.S. 913 (1992) (invalidating 24 hour-a-day ban on such programming). In Section 16(a) of the Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 954, codified at 47 U.S.C. 303 note (Supp. V 1993), Congress instructed the FCC to promulgate regulations generally prohibiting indecent broadcasting between the hours of "6 a.m. and 12 midnight." In *Action for Children's Television* v. *FCC*, 58 F.3d 654 (D.C. Cir. 1995) (en banc), petitions for cert., Nos. 95-509 (filed Sept. 26, 1995) & 95-520 (filed Sept. 28, 1995), that statute and the FCC's regulations were invalidated to the extent they prohibited indecent broadcast programming between 10 p.m. and midnight.

The FCC generally initiates broadcast indecency forfeiture proceedings after receiving an indecency complaint from a listener or viewer that is accompanied by a tape or transcript of significant excerpts of the offending programming, as well as information identifying the station and the date and time of the broadcast. Pet. App. 4a; C.A. App. 41-42 (Stipulation of Fact No. 9). If a complaint contains the required information, it is examined by the Commission's staff to determine whether the matter warrants further investigation. If not, the complaint is dismissed. If the complaint is not dismissed, a "Letter of Inquiry" (LOI) often is sent requesting further information from the broadcaster named in the complaint. Pet. App. 33a.

After further consideration, if the Commission's staff determines that such action is warranted, a "Notice of Apparent Liability" (NAL) is issued. The NAL sets forth the facts underlying the agency's claim that the relevant law or regulations were violated, and gives the person an opportunity (generally 30 days) to submit materials in its defense. 47 U.S.C. 503(b)(4); 47 C.F.R. 1.80(f)(3).[2] The Com-

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[2] Under 47 U.S.C. 504(c),

> [i]n any case where the Commission issues a [NAL] looking toward the imposition of a forfeiture * * *, that fact shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued, unless (i) the forfeiture has been paid, or (ii) a court of competent jurisdiction has ordered payment of such forfeiture, and such order has become final.

Petitioners originally asserted that the FCC violates that provision in administering the broadcast indecency scheme. The courts below refused to entertain that statutory claim on the ground that it was within the FCC's primary jurisdiction,

mission or its Mass Media Bureau then reviews the broadcaster's response (if any) to the NAL, and determines whether a forfeiture is warranted. Pet. App. 34a.[3]

In determining the amount of any forfeiture, the Commission is required to take into account "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." 47 U.S.C. 503(b)(2)(D) (Supp. V 1993). In no event may a forfeiture penalty exceed $25,000 for each violation, or each day of a continuing violation. 47 U.S.C. 503(b)(2)(A) (Supp. V 1993). A forfeiture for a continuing violation arising out of a single act or omission may not exceed $250,000 in total. *Ibid.*

A forfeiture penalty is due and payable once it has been imposed by the Commission. Any person may refuse to pay the penalty, however, and force the FCC to refer the matter to the U.S. Attorney's Office for collection in a trial *de novo* in federal district court. 47 U.S.C. 504(a).

2. This case was commenced by various broadcasters and broadcast organizations, joined by several organizations representing listeners and viewers, who sued in federal district court to challenge the

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see Pet. App. 9a-12a, 43a-45a, and petitioners have abandoned it in this Court. See Pet. 10 n.11.

[3] The statute also authorizes the FCC, in its discretion, to impose a forfeiture after holding a formal administrative hearing, with review of the agency's decision in the court of appeals under the Administrative Procedure Act. 47 U.S.C. 503(b)(3). Although it reserves the right to do so, 47 C.F.R. 1.80(g), the FCC currently does not use that procedure to impose a forfeiture for broadcast indecency. Pet. App. 3a.

lawfulness of the procedures by which the FCC enforces the prohibitions against broadcast indecency. Petitioners contended that the regulatory scheme as administered by the FCC unconstitutionally restrains their expression. The parties filed motions for summary judgment on a stipulated record, and the district court granted judgment for the government.

After rejecting the contention that petitioners' constitutional claims fell within the exclusive jurisdiction of the court of appeals, Pet. App. 41a-43a, the district court held that the claims of only petitioner Infinity Broadcasting Corporation (Infinity) were properly before it. Pet. App. 45a-52a. Relying on controlling circuit precedent, the court found that the organizations representing listeners and viewers lacked standing to assert their challenge to the FCC's indecency forfeiture proceedings. Pet. App. 45a-46a. The court came to the same conclusion regarding the broadcast petitioners that had never been involved in a forfeiture proceeding, reasoning that they could not show that they had suffered any injury from the challenged procedures. Pet. App. 47a-48a. The court also dismissed on ripeness grounds the claims of those broadcasters who had not had final forfeiture orders entered against them, observing that the FCC might decide not to impose a forfeiture. Pet. App. 50a-51a. Finally, the court dismissed the claims of petitioner Evergreen Media on grounds of comity, explaining that Evergreen was challenging the forfeiture order entered against it in a lawsuit pending in another district. Pet. App. 52a.

On the merits, the district court upheld the constitutionality of the broadcast indecency forfeiture procedures. Distinguishing the actions of the Rhode Island commission condemned by this Court in

Bantam Books, Inc. v. *Sullivan*, 372 U.S. 58 (1963), the court found that the FCC is not engaged in "the prior review and censorship of broadcast material," but is instead enforcing a "court-approved definition of indecency through a system that provides for notice and judicial review." Pet. App. 59a.

3. The court of appeals affirmed. It agreed with the district court that petitioner Infinity had standing and that its claims were ripe for adjudication. Pet. App. 12a-14a. The court also agreed that the FCC is "not operating a scheme of informal censorship like the one held unconstitutional in Bantam Books." Pet. App. 14a.

The court of appeals rejected petitioners' facial challenge to the forfeiture provisions, finding that the provisions are "clearly capable of constitutional application." Pet. App. 16a. As the court explained, "nothing in the statutes or regulations prevents the Commission from issuing a NAL, imposing a forfeiture, and if need be referring a case to the Department of Justice all within a period of time short enough virtually to eliminate any concern with delay." Pet. App. 15a (suggesting that "[t]he whole course could probably be run in most cases within, say, 90 days").

The court also upheld the constitutionality of the broadcast indecency regulation scheme as generally applied by the Commission. As the court observed, "the Commission is not administering anything akin to a literal prior restraint." Pet. App. 18a. "Broadcasters are free to air what they want; if and only if what they air turns out to transgress established guidelines do they face a penalty—but that is very much after the fact, not prior thereto." *Ibid.*

In addition, the court observed, the regulatory scheme did not constitute a "prior restraint in effect," since it would not "cause[] a speaker of reasonable fortitude to censor itself in order to conform with an unconstitutional standard." Pet. App. 18a. Among other things, the court emphasized, it had no evidence that the FCC "is * * * enforcing the statutory ban on indecency against material that is not indecent," or that it "has done anything actively to discourage judicial review of any indecency forfeiture it imposed," or that it "has failed or will fail to follow judicial guidelines for determining what is indecent and what is not." Pet. App. 18a-19a.

Finally, the court pointed to "[t]wo avenues of relief" open to any broadcaster concerned about excessive delay in the administration of the broadcast indecency scheme. Pet. App. 21a. First, the court observed, a broadcaster could "stipulate [to] the facts giving rise to the Notice of Apparent Liability and state that it will not pay the forfeiture unless ordered to do so in district court." *Ibid.* That would allow the FCC to refer the matter immediately to the Justice Department, thereby expediting the broadcaster's opportunity for a judicial trial on the merits. *Ibid.* In the alternative, the court suggested, a broadcaster "suffering from demonstrably adverse consequences from government delay in initiating the collection proceeding" could file an action seeking a declaratory judgment that the material in question is not indecent, and in that manner "dispel any unwarranted chilling effect." Pet. App. 22a.[4]

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[4] Chief Judge Edwards, concurring, emphasized that petitioners had "failed to show that speech that is not indecent is in fact being chilled." Pet. App. 24a. Judge Tatel dissented.

ARGUMENT

The court below held that it had jurisdiction over the claims of only one petitioner—Infinity. In September of this year, however, Infinity executed a settlement agreement with the government that disposed of all of the pending indecency forfeiture actions against it. By reason of that settlement, Infinity no longer has a concrete stake in the outcome of the claims it asserts in this case. Because the petition for certiorari does not seek to review the district court's dismissal of the claims asserted by any of the other petitioners for lack of standing or ripeness, and because Infinity is no longer subject to any indecency proceedings, the petition should be denied.

The decision below is also the first by any court of appeals to address the constitutionality of the procedures by which the FCC enforces the statutory limitations against the broadcast of indecent programming. Because the decision does not conflict with that of any other court and correctly disposes of the issues presented by this case, further review is not warranted.

1. As petitioners acknowledge (Pet. 7), on September 1, 1995, Infinity entered into a comprehensive settlement agreement with the FCC and the Department of Justice that disposed of all pending indecency forfeiture matters against it.

Pursuant to that agreement, the FCC vacated the pending forfeiture order and NALs that had been issued against Infinity, and ordered its Mass Media

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In his view, the case should have been remanded to the district court "to establish procedures to facilitate prompt judicial review of forfeiture determinations." Pet. App. 30a.

Bureau to dismiss "as to Infinity * * * all pending complaints that either involve programming aired or originated by Infinity." *Sagittarius Broadcasting Corp.*, FCC No. 95-386, 1995 WL 521389 (Sept. 1, 1995), at 2. The FCC also agreed to treat the forfeiture, the NALs and the pending complaints "as null, void, and expunged from Infinity's record for all purposes, including, but not limited to, any future qualifications issue, future licensing proceeding or future transfer of control or assignment of license or permit involving Infinity." *Id.* at 4. By reason of the settlement and the disposition of all pending indecency enforcement actions against it, Infinity is no longer suffering any concrete, imminent injury resulting from the FCC's enforcement of the broadcast indecency limitations. This Court therefore lacks jurisdiction to review its claim that the enforcement procedures are unconstitutional. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

Petitioners briefly assert in a footnote in their statement of the case that the district court's dismissal of the constitutional claims of petitioners other than Infinity was "improper[]." Pet. 10 n.11. But nowhere in their questions presented (or elsewhere in the petition, for that matter) do petitioners raise the issues of standing, ripeness, and comity relied upon by the district court to dismiss those claims. See Pet. i, 12-22. Petitioners have thus failed to preserve those issues for review by this Court. Sup. Ct. R. 14.1(a); *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645 (1992).

In sum, Infinity has comprehensively settled the FCC's case against it, thus placing its standing and the ripeness of its claim in no different posture than

those of the other broadcast petitioners. In this Court, petitioners do not challenge the district court's disposition of the other petitioners' claims on standing, ripeness, and comity grounds. Since that disposition provides an independent and unchallenged basis for affirmance of the judgment below, petitioners are in no position to secure review by this Court of the claims they press in their petition.

2. Moreover, petitioners do not claim that there is any conflict among the circuits on the issues disposed of by the decision below. On the contrary, the court of appeals was the first to address the constitutionality of the FCC's broadcast indecency forfeiture scheme. Other broadcasters remain free to attempt to persuade another court of appeals that, despite the decision below, the Commission's enforcement of the broadcast indecency limitations is constitutionally defective. In addition, an individual broadcaster can also raise the same issues as part of its defense to a suit to collect an indecency forfeiture. See *United States* v. *Evergreen Media Corp.*, 832 F. Supp. 1179, 1183 (N.D. Ill. 1993). Unless and until a circuit conflict arises on the issues presented by this case, review by this Court would not be warranted even if the proffered issues were properly before this Court.[5]

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[5] There is no reason to hold this petition pending the disposition of *Pacifica Foundation* v. *FCC*, petition for cert., No. 95-509 (filed Sept. 26, 1995), and *Action for Children's Television* v. *FCC*, petition for cert., No. 95-520 (filed Sept. 28, 1995). Those cases involve the substance of the government's power to regulate indecent broadcast programming, not the procedures by which indecency restrictions are enforced. Nor should the petition in this case be held for disposition in light of *Denver Area Educational Telecommunications Consortium, Inc.* v. *FCC*, cert. granted, No. 95-124 (Nov. 13, 1995), and

3. There is no merit in any event to petitioners' claims that the broadcast indecency enforcement scheme constitutes a system of "informal censorship" or a prior restraint. Pet. 14. By statute, a broadcaster subject to an FCC indecency enforcement proceeding has the unrestricted right to a trial "de novo" in federal district court before it can be required to pay any forfeiture penalty. 47 U.S.C. 504(a). If the district court does not agree with the FCC's indecency determination, the broadcaster cannot be compelled to pay the forfeiture. There is thus no enforceable obligation to pay an FCC broadcast indecency forfeiture order until a district court has determined, after a trial, that the Commission's indecency determination is correct.

Petitioners assert that they nonetheless "attempt to conform their conduct to the indecency standards articulated by the FCC and its Commissioners, whether or not they believe those standards are constitutional." Pet. 12 n.15 (emphasis omitted). Because it is ordinarily assumed that persons will attempt to conform their conduct to federal law, as announced and enforced by the appropriate authorities, petitioners' voluntary efforts to do so do not convert the FCC's actions into a censorship scheme. As this Court has recognized, deterrence of unlawful conduct, even in the area of the First Amendment, is a "legitimate end" of government. *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 60

Alliance for Community Media, Inc. v. *FCC*, cert. granted, No. 95-227 (Nov. 13, 1995). Those cases involve the government's substantive power to regulate indecent programming under the entirely different regulatory scheme governing cable television; they too do not involve the procedures by which the regulations are enforced.

(1989); *Alexander* v. *United States*, 113 S. Ct. 2766, 2774 (1993). In this case, the court of appeals found, there is no basis on which to conclude that "the FCC is * * * enforcing the statutory ban on indecency against material that is not indecent." Pet. App. 18a. If petitioners disagree, however, they have only to refuse to pay any particular forfeiture and force the Commission to shoulder its burden of convincing a court that the material at issue is in fact indecent.

Because the FCC's forfeiture orders are not self-executing, petitioners err in asserting (Pet. 14-15) that the court of appeals' decision conflicts with a number of cases in which this Court has emphasized the need for prompt judicial review of prior restraints, see *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 556 (1975); *Freedman* v. *Maryland*, 380 U.S. 51, 60 (1965), or similar schemes under which government action to suppress speech took effect *before* the target of the action had the opportunity for judicial review, *Riley* v. *National Federation of the Blind*, 487 U.S. 781, 801-802 (1988) (professional fundraisers had "to await a determination regarding their license application before engaging in solicitation"); *Blount* v. *Rizzi*, 400 U.S. 410, 418-419 (1971) (once administrative order is entered, orders for magazines may be returned to senders and money orders may not be paid to publishers of magazines). Those cases provide no support for petitioners' contention that prompt judicial review is similarly essential where the governmental action takes effect only *after* judicial review occurs.

4. Petitioners err in asserting (Pet. 13-19) that the decision of the court of appeals conflicts with this Court's decision in *Bantam Books, Inc.* v. *Sullivan*,

372 U.S. 58 (1963). In *Bantam Books*, the Rhode Island Commission to Encourage Morality in Youth notified book distributors that certain publications had been found "to be objectionable for sale, distribution or display to youths under 18 years of age," *id.* at 61, and that the Commission had a "duty to recommend" criminal prosecution of purveyors of obscenity, *id.* at 62. The Rhode Island Commission also circulated copies of the list of objectionable items to local police departments, and local police typically visited distributors to follow up on the Commission's notice. *Id.* at 62-63. Those tactics had the effect of causing distributors to withdraw their materials from circulation while at the same time discouraging them from contesting the Commission's actions in court. *Id.* at 63-64. As this Court found, the Commission had "deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim." *Id.* at 67.

As the court of appeals explained, "[t]he lesson of *Bantam Books*" is that the government "may not move to suppress speech by means of a scheme that, as a practical matter, forecloses the speaker from obtaining a judicial determination of whether the targeted speech is unprotected, lest [it] be able effectively to suppress protected speech." Pet. App. 17a. No such obstacles to judicial review obtain in this case. As the court of appeals emphasized, there is simply "no indication" that the FCC has done anything "actively to discourage judicial review of any indecency forfeiture it imposed." Pet. App. 19a.[6]

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[6] That few indecency cases have come before the district courts does not suggest that review is being obstructed, since the dearth of such cases may be "the effect of any of several

Petitioners complain (Pet. 13) that they face delays in obtaining judicial review.[7] But since a broadcaster is not under an enforceable obligation to pay a forfeiture penalty until a district court has found in the Commission's favor, any delay in obtaining judicial review does not, by itself, unduly burden petitioners' speech. In any event, as the court of appeals noted (Pet. App. 21a-22a), broadcasters have available ways of expediting the enforcement process—including stipulating to the facts or announcing an intention not to pay—that can serve to minimize any delay.[8]

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inoffensive causes: the Commission has only recently stepped up its enforcement efforts; the violators penalized thus far may very well have broadcast the indecency as charged and thus see no point in contesting the forfeiture in court; and broadcasters may be self-censoring only indecent material, eliminating the need for many prosecutions." Pet. App. 19a.

[7] In addition to civil proceedings initiated by the FCC, a broadcaster may be the subject of a criminal prosecution for broadcasting obscene or indecent material in violation of 18 U.S.C. 1464. Under the limitations period generally applicable to federal criminal proceedings, an indictment can be brought up to five years after the date of the offense. See 18 U.S.C. 3282. That is approximately in the middle of the two- to seven-year period that a broadcaster can expect to wait before appearing in court to contest an FCC forfeiture. See Pet. App. 5a-6a. Under petitioner's theory, therefore, an "undoubtedly constitutional," Pet. App. 16a, criminal prosecution that is brought within the statutory limitations period would have to be dismissed as in violation of the First Amendment.

[8] In stark contrast, Infinity affirmatively took steps to delay judicial review after the FCC imposed a forfeiture of $6,000 on Infinity in October 1992. See *Liability of Sagittarius Broadcasting Corp.*, 7 F.C.C.R. 6873 (1992). Infinity petitioned the agency for reconsideration of the forfeiture order. The Commission denied Infinity's petition for reconsideration

Petitioners also allude to the fact that individual FCC Commissioners have on occasion made public statements exhorting broadcasters to adhere to the Commission's indecency determinations. Pet. 5-6. As petitioners are aware, however, statements by individual Commissioners do not constitute actions by the Commission itself. *Illinois Citizens Comm. for Broadcasting* v. *FCC*, 515 F.2d 397, 402 (D.C. Cir. 1975). Moreover, none of those statements does more than emphasize that individual Commissioners take seriously the Commission's indecency enforcement responsibilities. It is not improper for the Commissioners, who are public officials, to discuss their views as to Commission policies. Indeed, as this Court emphasized in *Bantam Books*, it has never suggested "that law enforcement officers must renounce all informal contacts with persons suspected of violating valid laws [regulating speech] * * * [w]here such consultation is genuinely undertaken with the purpose of aiding the distributor to comply with such laws and avoid prosecution under them." 372 U.S. at 71-72.

There are a number of other reasons why the claims of informal censorship in this case are "not nearly as compelling" as those asserted in *Bantam Books*. Pet App. 21a. For example, in *Bantam Books*, a particular concern was that the informal and unreviewable actions taken by the Rhode Island Commission to Encourage Morality in Youth were backed up with the threat of society's most severe punishment—a prosecution for violation of a criminal statute. See 372 U.S. at 68 ("People do not lightly

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in May 1993. See *Sagittarius Broadcasting Corp.*, 8 F.C.C.R. 3600 (1993).

disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around."). In this case, the FCC's actions are reviewed *de novo* in a civil proceeding to collect the amount of the forfeiture—a proceeding that is not likely to have a similar effect on broadcasters, who have generally been able in the past to represent their interests forcefully in court when they choose to do so. Moreover, this case, unlike *Bantam Books*, involves the regulation of broadcasting, which has historically received "the most limited First Amendment protection." *FCC* v. *Pacifica Found.*, 438 U.S. 726, 748 (1978); see *Turner Broadcasting Sys.* v. *FCC*, 114 S. Ct. 2445, 2456 (1994). Broadcasters also receive notice and an opportunity to be heard before the FCC makes any final determination of indecency. Compare 372 U.S. at 71. Lastly, while a bookseller seeking to avoid a dispute with the Rhode Island Commission had to cease selling the disputed books to anyone—child or adult—a broadcaster wishing to avoid a dispute with the FCC "need only move its arguably indecent material to a different time of day, not refrain from broadcasting it altogether." Pet. App. 21a. See generally *Action for Children's Television* v. *FCC*, 58 F.3d 654 (D.C. Cir. 1995) (en banc), petitions for cert., Nos. 95-509 & 95-520.

In the end, petitioners' claims would effectively preclude the Commission from developing and elaborating upon "Congress's declared policy of banning indecency from the air-waves during certain hours of the day." Pet. App. 19a. There is nothing inherently unconstitutional about administrative enforcement of otherwise lawful government regulation of speech. In this case, moreover, the Commission's

expertise and policy judgment are especially well-suited to resolution of the factual and contextual issues that underlie indecency determinations. *FCC* v. *Pacifica Found.*, 438 U.S. at 742, 750; see *Sable Communications of Cal., Inc.* v. *FCC*, 492 U.S. 115, 130 (1989).

CONCLUSION

The petition for a writ of certiorari should be denied.

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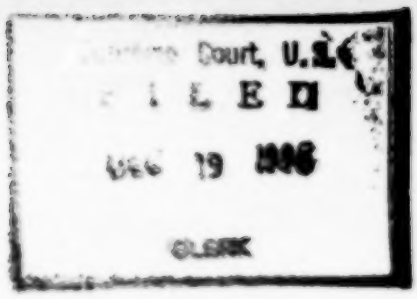

(3)

No. 95-620

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ACTION FOR CHILDREN'S TELEVISION, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY FOR PETITIONERS

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REPLY FOR PETITIONERS

1. The FCC's brief in opposition is most significant for what it leaves undisputed. *First*, the FCC does not dispute the exceptional importance of the question whether its scheme of indecency regulation is constitutional. As the FCC itself urged four years ago, the constitutionality of broadcast indecency restrictions "warrants this Court's attention" because it is "an issue of concern to virtually every American household." Petition for Certiorari at 21, *FCC v. Action for Children's Television*, No. 91-952 (Dec. 16, 1991). Since 1987, the FCC has issued at least 47 NALs for allegedly indecent broadcasting. Pet. 9 & n.10. The FCC also has announced plans to issue over 100 more, apparently depending on the outcome of current litigation. *See In the Matter of Sagittarius Broadcasting Corp.*, 1995 FCC LEXIS 5924, at *4 (Sept. 5, 1995) (Statement of Chairman Hundt).

Second, the FCC does not attempt to defend the grounds of decision asserted by the court of appeals: that a system of

"informal censorship" within the meaning of *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), is facially constitutional as long as no statute "prevents" prompt judicial review (Pet. App. 15a-16a) and that plaintiffs raising procedural challenges under *Bantam Books* must prove that the speech at issue is substantively protected (Pet. App. 18a-19a). As explained in the petition for certiorari (Pet. 14-17), those holdings squarely conflict with numerous decisions of this Court.

Third, the FCC does not dispute that its enforcement scheme, as a practical matter, has completely foreclosed judicial review of individual indecency forfeitures. Pet. App. 5a.[1] The FCC concedes that the process of administrative adjudication and judicial review consumes between two and seven years, although it could occur within less than 90 days, and that no indecency forfeiture has been reviewed on the merits. Opp. 6, 14 n.7.[2] The FCC also does not dispute that it uses indecency forfeitures to instruct broadcasters how to program their stations and that it threatens them with substantial and escalating penalties unless they comply immediately. Pet. App. 6a, 38a-39a.

Finally, although every judge on the panel below expressed

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[1] As explained in the petition for certiorari (Pet. 8-9), the only circumstances where review has been available are in cases where the FCC has imposed general indecency restrictions by regulation or in extremely rare cases where the FCC has rendered an adjudicatory determination of indecency, but has declined to impose a forfeiture. Neither context affords any opportunity to obtain review of the dozens of indecency determinations rendered in the context of forfeiture orders. Thus, as a practical matter, the FCC's individual enforcement decisions escape review entirely.

[2] The one case cited by the FCC, *United States v. Evergreen Media Corp.*, 832 F. Supp. 1179 (N.D. Ill. 1993), is the only collection action brought by the government since 1987. That case was settled over 18 months after it was filed, and over 6.5 years after the allegedly indecent broadcast at issue, without any judicial determination of the constitutional defenses raised by the broadcaster. *See* Pet. 4-5.

doubts about whether the indecency forfeiture scheme is constitutional,[3] the FCC does not suggest that its current enforcement policies are likely to change. On the contrary, the FCC remarkably argues that its aggressive interim enforcement, without judicial review, is justified because "deterrence of unlawful conduct, even in the area of the First Amendment, is a 'legitimate end' of government." Opp. 11. Moreover, the FCC attempts to place responsibility for the extraordinary delays in judicial review on broadcasters who will not "expedit[e] the enforcement process" by "stipulating to the facts" alleged by the FCC. Opp. 14.[4]

2. Despite these significant concessions, the FCC nonetheless opposes review in this Court. The FCC contends (Opp. 8-9) that there is no case or controversy because petitioner Infinity Broadcasting Corporation recently settled all of its pending cases and because the district court dismissed the other petitioners from the case. The FCC argues that because there are no longer "pending" enforcement proceedings, Infinity "is no longer suffering any concrete, imminent injury resulting from the FCC's enforcement of the broadcast indecency limitations." Opp. 9.

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[3] *E.g.*, Pet. App. 2a, 16a (majority twice characterizing scheme as constitutionally "troubling"); Pet. App. 22a, 24a (concurrence "with reservations" noting "serious problems with the current practice followed by the FCC"); Pet. App. 29a-30a (dissent concluding that FCC's "manipulation of speech without judicial review is unconstitutional").

[4] The FCC suggests that Infinity "affirmatively took steps to delay judicial review" (Opp. 14 n.8) by filing a prompt petition for reconsideration one month after an adverse FCC forfeiture order. *See* Stipulations of Fact, Ex. 3, at 1A, *Action for Children's Television v. FCC*, No. 93-0400 (D.D.C. Mar. 24, 1993) (hereafter "Stipulations"). The FCC took six months to adjudicate the petition. *See id.*; Opp. 14 n.8. In that same case, the FCC took 22 months to issue an NAL (from the date of the complaint), and an additional 23 months to issue the forfeiture. *See* Stipulations, *supra*, Ex. 3, at 1 to 1A.

The FCC cites no case for the proposition that there cannot be a case or controversy absent pending enforcement proceedings. This Court routinely has upheld the standing of plaintiffs to seek prospective relief against *future* enforcement, despite the absence of pending proceedings. *See, e.g., Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979); *Steffel v. Thompson*, 415 U.S. 452, 458-60 (1974); *Doe v. Bolton*, 410 U.S. 179, 188 (1973); *Epperson v. Arkansas*, 393 U.S. 97, 101-02 (1968). A requirement of pending proceedings would entail the absurd consequence that federal courts could never afford prospective relief against enforcement by the states, because the existence of pending state proceedings triggers a duty to abstain under *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny. *See, e.g., Trainor v. Hernandez*, 431 U.S. 434, 441-46 (1977). On that view, this Court could not have even decided *Bantam Books*.

A plaintiff may seek prospective relief to prevent future injuries that are neither "conjectural" nor "hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).[5] The FCC has promised continued aggressive enforcement both in its official decisions and in the stipulated record filed in this case. *See, e.g.*, Stipulations, *supra* note 4, at 17; *Notice of Apparent Liability to Infinity Broadcasting Corp.*, 8 FCC Rcd 6740, 6741 (1993). Infinity alone has been the subject of five enforcement proceedings where the forfeitures totalled over $1.7 million. Pet. 6-7. The FCC's activity clearly establishes a case or controversy as to future enforcement.

Throughout this litigation, broadcasters including Infinity have claimed standing not only because of pending proceedings, but

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[5] The injury must be traceable to the defendant and redressable by a favorable decision on the merits. *See Defenders of Wildlife*, 504 U.S. at 561. The FCC does not dispute that these requirements are satisfied here.

also because of a credible threat of future enforcement.[6] As a prevailing party with respect to standing, Infinity could not have sought review to challenge the reasoning of the courts below on that point. *See, e.g., Public Service Comm'n v. Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939). At a minimum, Infinity may continue to assert the possibility of future enforcement as a proper, and properly preserved, ground for standing in this Court. *See, e.g., Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.19 (1979).[7]

3. The absence of a conflict among the circuits does not argue against review.

a. As noted above, the FCC does not dispute the exceptional importance of the question presented. This Court has granted review in the past, despite the absence of a circuit conflict, to consider important questions about the scope of the FCC's power to regulate indecent broadcasting. *See FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Denver Area Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. 471 (1995) (granting certiorari).

b. This case presents an ideal vehicle for resolving the question. The nineteen petitioners in this case include not only

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[6] *See, e.g.*, Complaint, *Action for Children's Television v. FCC*, No. 93-0400, at 25 (D.D.C. Feb. 24, 1993) (hereafter "Complaint") (requesting court to "order the dismissal of all indecency forfeiture proceedings . . . currently pending" *and* to "enjoin the FCC from initiating or conducting [indecency] forfeiture proceedings"); Brief of Appellants, *Action for Children's Television v. FCC*, No. 93-5178, at 42-44 (D.C. Cir. May 18, 1994) (argument titled "All Broadcasting Plaintiffs Have Alleged Sufficient Article III Injury").

[7] As long as Infinity has standing to litigate the question presented, the standing of the other petitioners is immaterial. *See, e.g., Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264 n.9 (1977). The court of appeals recognized this point: after concluding that Infinity has standing, it addressed petitioners' claims on the merits without determining whether the district court had properly dismissed the other petitioners. Pet. App. 12a-14a.

individual broadcasters but also broad-based organizations, such as the National Association of Broadcasters, that represent virtually every interest affected by the FCC indecency enforcement scheme.[8] The record contains a series of stipulations exhaustively chronicling FCC enforcement activities since 1987. Both courts below filed published opinions engaging the constitutional question at some length. And, as noted above, the FCC has made clear that it has no intention of tempering its enforcement activities.

c. Deferring review would significantly harm the First Amendment interests at issue. While the FCC suggests that other broadcasters might "persuade another court of appeals" in the future (Opp. 10), such litigation is unlikely to be commenced because most of the affected parties are already represented here, and new litigation, even if not barred by *res judicata*, would consume several more years. The FCC's alternative suggestion that broadcasters raise constitutional challenges as a defense in enforcement proceedings (Opp. 10) simply urges that they submit to the very scheme they contend is unconstitutional. It also ignores the practical impossibility of obtaining such review.

d. While the court of appeals' specific holding might not directly conflict with the holdings of other circuits, its narrow reading of *Bantam Books* is in considerable tension with various other appellate decisions. *See, e.g.*, *United States v. P.H.E., Inc.*, 965 F.2d 848, 855-56 (10th Cir. 1992) (applying *Bantam Books* to invalidate multiple prosecutions for distribution of

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[8] Petitioners include six broadcasters; two program distributors; eight organizations representing broadcasters, distributors and journalists; and three organizations representing listeners and viewers. *See* Complaint, *supra* note 6, at 3-10. While the FCC presently asserts (and we agree) that broadcasters may raise *Bantam Books* challenges in future cases (Opp. 10), the FCC might resist those challenges by seeking to invoke traditional preclusion doctrines. *Cf.* Restatement (Second) of Judgments § 41(1) (1982) (person "represented by a party" is sometimes bound by judgment).

allegedly obscene material); *Planned Parenthood Federation v. Agency for Int'l Development*, 915 F.2d 59, 64 (2d Cir. 1990) (*Bantam Books* applies to "censorship by means of intimidation"), *cert. denied*, 500 U.S. 952 (1991); *Cruz v. Ferre*, 755 F.2d 1415, 1422 (11th Cir. 1985) (applying *Bantam Books* to invalidate municipality's indecency forfeiture scheme). Review is appropriate to address this "conflict in principle." *Ivan Allen Co. v. United States*, 422 U.S. 617, 623-24 (1975).

4. On the merits, the FCC contends primarily that its indecency forfeiture scheme does not constitute a system of "informal censorship" because its orders "are not self-executing," but "tak[e] effect only *after* judicial review occurs." Opp. 12. The FCC completely fails to distinguish the scheme at issue in *Bantam Books*, where the censoring authority could impose no "self-executing" sanction at all, but could merely refer the targeted speakers to the state attorney general for prosecution. *See* 372 U.S. at 66. Nonetheless, as the court of appeals recognized, this Court held that the scheme constituted an impermissible system of "informal censorship" because it had an immediate effect and foreclosed judicial review "as a *practical* matter." Pet. App. 17a (emphasis added).[9]

5. Finally, the FCC contends that petitioners' claims, if successful, "would effectively preclude the Commission" from

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[9] While the FCC notes that statements by FCC Commissioners "do not constitute actions by the Commission itself" (Opp. 15), it does not dispute that this Court considered comparable statements in assessing the practical effect of the enforcement scheme at issue in *Bantam Books*. *See, e.g.*, 372 U.S. at 67. Contrary to the FCC's suggestion (Opp. 15-16), this Court frequently has applied the procedural principles of *Bantam Books* in cases involving primarily civil enforcement. *See, e.g.*, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547 (1975); *Blount v. Rizzi*, 400 U.S. 410, 411-12 (1971). The FCC also repeats the various purported distinctions of *Bantam Books* relied upon by the district court and not addressed by the court of appeals. Opp. 16. As explained in the petition for certiorari (Pet. 18-19), those distinctions are insubstantial.

enforcing indecency restrictions. Opp. 16. In fact, however, the claims would impose no substantive restrictions on the permissible scope of indecency regulation, but would simply require an affirmative guarantee of prompt judicial review of FCC indecency determinations. The First Amendment demands no less.

CONCLUSION

The petition for a writ of certiorari should be granted.

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